Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law

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BLACKSTONE SCHOOL OF LAW
CHICAGO

Modern American Law

AGENCY

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SALES OF PERSONAL PROPERTY

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PERSONAL PROPERTY AND BAILMENTS

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VOLUME 2

BLACKSTONE SCHOOL OF LAW
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PREFACE.

Four important subjects are covered in this volume: Agency, Sales, Personal Property, and Bailments. The first is one of the oldest in the law. Whether in the simple conditions of the social and business community of pioneer days or in the complex and diversified activities of the modern business world, the advantage and convenience of performing acts by the hand of another are apparent. It is impractical, if not impossible, to do everything by one's own hand. The capacity to acquire legal rights and to incur legal liabilities by reason of the acts of other persons is one of the basic conceptions of the law. The maxim is that what a man does by the hand of another he does by his own hand. In law, the agent's act is the act of the principal. Sometimes, this subject is treated under the title of Principal and Agent, or even Master and Servant. The general title Agency covers the entire subject.

The second treatise deals with the great commercial subject of Sales. Buying and selling personal property in all its forms is the chief factor in commerce. Consequently, the law governing the transfer of rights in personal property is of prime importance to the business man. To lessen confusion in business, a codification of the law of sales has been made—known as the Uniform Sales Act—which

has been adopted in many states and which is covered in this treatise, too.

Inasmuch as Sales deals almost entirely with personal property, the third treatise in this volume is on the Law of Personal Property. Here Personal Property is distinguished from Real Property, and how title to it can be acquired and transferred is explained.

As a branch of the subject of Personal Property, the fourth topic—Bailments—completes the subject-matter of this volume. Bailments has to do with Personal Property entirely. It is that branch of it which deals with the rights and liabilities of possessors of chattels as distinguished from owners of chattels.

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PART I

AGENCY

BY

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CHAPTER I.

INTRODUCTION.

1. **Agency as a separate branch of the law.**—The law of agency is, strictly speaking, a part of the law of contracts. It is, however, treated as a separate topic in the development of substantive law and there are many textbooks on the subject, as well as many collections of cases. It is often treated under the title "Principal and Agent," and under that head it may be looked for especially in digests, encyclopedias, and other legal reference books.

Agency as a distinct subject was hardly known to the common law. Some of the rules applicable to the rights, duties, and liabilities of the servant as they were formulated under the subject of "Master and Servant" were applied to the agent. It is not denied that an agent is an employee, but he is an employee of a peculiar character and bears a closer personal relationship to his employer than the ordinary servant, and it has therefore come to pass that

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instead of treating the subject of agency under the head of "Employer and Employee," or under the head of "Master and Servant," it has been found necessary, by reason of the distinct rules applying to agency, to treat it under its own title. In the complex business arrangements of modern times a principal may need many representatives to act on his behalf in matters involving skill, judgment, and discretion, and it is with regard to the relationships arising out of this representation, as between the principal and the agent, between the principal and the third party with whom the agent deals, between the agent himself and the third party, that we have to treat in the discussion of this subject.

2. **Agent defined.**—An agent is one who acts for and on behalf of another person called the principal, in the same manner as the principal might himself act in the particular matter in which the authority is conferred. It is therefore a relationship founded upon contract; that is to say, the principal agrees to confer the authority upon the agent, and the agent agrees to carry out the authority so conferred. It will be shown later that this authority may be express or implied. It may be an authority conferred by written power of attorney or it may be an authority conferred orally. To establish the relationship a writing is not necessary except in the particular case wherein an agent is required to do or perform an act under seal, in which event the authority given to him must be under seal, because of the doctrine that authority to execute an instrument under seal must be evidenced by an instrument

of equal solemnity. An agent is sometimes called an attorney-in-fact.

3. **Principal defined.**—The principal is the person for, and on behalf of whom, the agent acts; the person who confers the authority on the agent. The principal is the constituent; the agent is the representative. When therefore one person duly authorizes another person to act on his behalf, an agency is created within the terms of the authority conferred, and the act done by the agent within that authority has the same binding effect upon the principal as if the act were done by himself. *"Qui facit per alium facit per se"* is a Latin maxim fundamental in the law of agency and means: "He who acts through another acts for himself." The principal, acting through the medium of the agent, is brought into contractual relations with other persons, with the same effect as if he made the contract directly. He acquires the same rights and is subject to the same responsibilities through the act of the agent as if he acted on his own behalf.

4. **Servant and agent distinguished.**—It is often said that every agent is a servant, but that every servant is not an agent. Agency is looked upon as a higher form of employment than service. A servant is usually not vested with authority to bring third parties into contractual relationship with the master and usually is not a factor causing a change of legal relationship between the master and third persons. It is only where the servant commits a breach of his obligations or injures some person in the performance of his master's instructions that the

master is put under obligations to other parties through the servant's acts. The servant, therefore, is one who is usually employed by the master to perform mechanical and fixed duties and is usually not vested with authority to perform, on behalf of his master, acts calling for the exercise of skill, judgment, or discretion, and, generally speaking, is an employee of more restricted authority than the agent.[1]

5. **Classes of agents.**—Among the more common classes under which agents are grouped are those resting upon the extent of the authority conferred, namely: general agents and special agents. A general agent is one who is empowered to transact all of the business of his principal of a particular kind, or one who is empowered to transact all of his principal's business in a particular place. A principal may have more than one general agent. He may have a general agent in Baltimore and one in New York, and in each place the agent represents the principal in the particular line of business delegated to him; or the principal may have a general agent to manage his real estate, and one to manage his manufacturing business.

A special agent is one who is authorized to act in a particular transaction. He cannot bind his principal in any other transaction than that in which he is given authority. It is to be borne in mind that a special agent is just as much an agent as a general agent in the particular matter in which he is author-

[1] Wakefield v. Fargo, 90 N. Y. 213, LEADING ILLUSTRATIVE CASES; Singer Manufacturing Co. v. Rahn, 132 U. S. 518.

ized to act. It will therefore be seen that it is the extent of the authority conferred which makes the agent either general or special.

Another classification of agents includes those called universal agents. Universal agency is not of common occurrence and, generally speaking, where the term is used, it refers to an agency wherein a person is authorized to transact all of the business of a principal of every kind and nature.

6. **Special forms of agency.**—There are certain forms of agency which have rules somewhat peculiar to themselves and make up a special body of the law on this subject that requires special consideration. These forms of agency will be more fully treated in the last chapter of this article. The most common of the special forms of agency are Attorneys-at-Law or Attorneys and Counsellors-at-Law, Auctioneers, Brokers, and Factors or Commission Merchants.

Partners are sometimes placed in this group, but the rights, duties and liabilities of partners, as between themselves and as to third persons, form a special branch of the law and are treated under the topic "Partnership." It is true that in every partnership there is an agency, that is to say, each partner within the scope of the partnership business is an agent for the firm. To put it differently, each partner may bind the co-partnership by any legitimate act performed within the proper limitations of the partnership business.

CHAPTER II.

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT.

7. **Purposes for which an agency may be created.**—As a general rule any act which may lawfully be done by a principal may be done by him through an agent. If a principal is capable of making any other contract he may make the contract of agency and in the contract he may authorize his agent to do any act which he might himself lawfully do. The principal being prohibited by law from performing an illegal or immoral act, or one opposed to public policy, he cannot do or perform such act through an agent. If this be attempted the agency will have no binding force. The law will not aid in the performance of a contract made through an agent if the object to be attained be illegal or immoral or against public policy. Sometimes a contract or a statute requires an act to be performed by a person in his individual capacity; such acts are in the nature of trusts and could hardly be considered in a discussion of the law of agency.

8. **Illegality of object.**—As to the illegality of the object of an agency the illustration is frequently cited which refers to the authority given to one to use his influence with the government to procure the enactment of certain laws or public acts. An agent who is employed to procure or defeat legislation by

use of personal solicitation or influence with legislators cannot compel payment for his services. Such a contract of agency is void as being contrary to public policy. The gist of the decisions in this connection is that such an arrangement has a tendency toward corruption of public officials. Even where no corrupt act is specifically pointed out and no illegal or undue personal influence is shown, yet the courts condemn such contracts of agency on the particular ground that they are contrary to public policy and tend toward a wrongful influence over governmental action. Law makers and officials having to do with public affairs must be free and deliberate in the performance of their obligations. It is not the actual use of corrupt methods by the agent but the necessarily injurious tendency to use corrupt methods which condemns such contracts as illegal and contrary to public policy. As was said in one case:

"It is not necessary to adjudge that the parties stipulated for corrupt action or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to these results. It furnishes a temptation to the plaintiff (agent) to resort to corrupt means or improper devices to influence legislative action."[2]

So in like manner one employed to render services to prevent prosecutions for crime and to use his influence with public prosecutors cannot enforce payment for his services. Gambling contracts, being

[2] Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535, LEADING ILLUSTRATIVE CASES.

void when made by the principal, are void when made through an agent.

On the other hand, however, an agent may be employed in connection with matters affecting the public weal when the nature of the employment is to seek a proper and legitimate object. An agent may be authorized to make arguments before a legislative committee or before the head of a department of government, or to prosecute a claim against the government or a public official, or to procure and submit petitions to a legislative or investigating body. These, because the objects are legal ones, namely: openly to present reasons for or against a contemplated public act, or to recover, through the medium of the courts, a disputed claim.

To sum the matter up, then, it may be stated generally that an agent may be employed to do or perform any act or thing which the principal himself is capable of lawfully doing or performing.

9. **The contract of agency.**—The relation of principal and agent is formed by a contract between the principal and the agent, whereby the principal authorizes the agent to perform a certain act and the agent agrees to perform such act. It is a meeting of the minds of both parties on the subject matter in question. It is a mutual consent to the formation of the relation. Once the contract is formed it is binding upon both parties and when the agent acts under the contract and within the scope of the authority conferred he brings the principal into contractual relationship with the third persons with whom he deals. It is only when the agent oversteps

the contract or performs some unauthorized act that the principal is relieved of responsibility. In such case the agent is not acting under his contract with the principal and so cannot bind the principal.

"It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent cannot create in himself an authority to do a particular act by its performance, and that the authority of an agent cannot be proved by his own statement that he is such."[3]

The contract of agency need not be in writing, unless it be one of the particular cases where the agent is required to perform an act under seal; or unless a writing is made obligatory by statute. The contract may be express or implied. It is express when it is made by the voluntary and express act of the parties, as by word of mouth or by a written instrument, which may be under seal or without seal, in the form of a letter or memorandum, or some less formal document. It is implied when it is inferred from the circumstances of a particular case, or from the acts, words, or conduct of the parties, or springs from the operation of some rule of law. An implied agency often arises from estoppel, that is to say, the principal will be estopped to deny the agency when his acts and conduct have led others to believe, on reasonable grounds, that the agency has in fact been created.[4]

[3] Graves v. Horton, 38 Minn. 66.

[4] Pole v. Leask, 33 L. J. Rep., Eq. 155 (Eng.), LEADING ILLUSTRATIVE CASES.

Appointment of agent to execute instrument under seal. Authority to execute an instrument under seal must be evidenced by an instrument under seal. Authority to execute a deed must therefore be conferred by power under seal. A sealed instrument, signed by an agent under parol authority, may, under certain circumstances, have effect. If the contract made by the agent be valid without a seal, it may be considered valid as a simple contract, although a seal was affixed. A conveyance executed by an agent who had parol authority may be given effect as a contract to convey, and a suit for specific performance may be based upon the paper actually executed. It may be stated, however, as the general rule, that when an agent is authorized to execute a contract under seal his appointment must be evidenced by an instrument of equal solemnity.

Appointment of agent to execute writings not under seal—Statute of Frauds. Statutes often require particular contracts to be reduced to writing; but it does not necessarily follow, unless the statute so states, that authority to execute such contracts must be in writing. By the provisions of the Statute of Frauds in the United States, as well as in England, the creation, assignment, and surrender of estates, with the exception of leases for a period not exceeding one year, are required to be by deed, and here the authority of the agent should be under seal. According to the provisions of the Statute of Frauds which relate to special promises of executors and administrators to answer out of their

own estate; to special promises to answer for the debt, default or miscarriage of another; to agreements made upon consideration of marriage; to contracts for sales of land and interests in lands; and to agreements not to be performed within one year, all of which require the agreement, or some note or memorandum thereof, to be in writing, the writing may be signed by the party to be charged or by some person thereunto lawfully authorized. The manner in which the agent is to be lawfully authorized is left to the rules of the common law; hence the agent need not be authorized by writing, and any form of ratification is sufficient.[5] In some states, however, it is required that the authority must be in writing.[6]

The same rules apply to the provisions of the Statute of Frauds with regard to contracts for the sale of goods, wares and merchandise for the price of $50 or over.

Contracts for the employment of agents wherein the agency is to continue for more than one year are governed by the Statute of Frauds and the agreement, or some note or memorandum thereof, must be in writing.[7]

10. **Elements of contract.**—All the elements necessary to any other enforcible contract must be present in the contract of agency, that is, the contract must be binding upon the principal as well as

[5] McLean v. Dunn, 4 Bing. 722 (Eng.); Hawkins v. Chace, 19 Pick. 502 (Mass.); Wiener v. Whipple, 53 Wis. 298.

[6] Chappell v. McKnight, 108 Ill. 570; Hall v. Wallace, 88 Cal. 434; Castner v. Richardson, 18 Colo. 496.

[7] Williams v. Bemis, 108 Mass. 91.

upon the agent; the parties must be competent to act; there must be a consideration, and the object to be attained must be legal. As to the form of the agreement, generally, there is no particular form required. I may say to a person, "I authorize you to sell my automobile for a sum not less than $2,000, and in the event of your selling the machine I will pay you 10 per cent of the price." This contract is as binding upon me as if I put it in the most formal writing. It is binding on the agent when he accepts the appointment. It is true the agency may be revoked, but that subject will be considered in another place; while the appointment remains in force it forms the basis of an enforcible contract.

Relationship between the parties, such as husband and wife, or parent and child, does not in itself indicate that one may act for the other as an agent. There must be a contract between these parties as between others, and the authority to act for the other must be shown to have been properly conferred.[8]

11. **Consideration.**—There must be a consideration in agency, as in all other contracts. It has been tersely put that consideration consists in benefit to the promisor, or in harm, detriment, or inconvenience to the promisee. It may be mentioned, however, that as to third persons the absence of a consideration between the principal and the agent is immaterial. The third person is not always put upon inquiring as to the existence or non-existence of a consideration, especially not in cases where the

[8] McLaren v. Hall, 26 Iowa 297; Johnson v. Stone, 40 N. H. 197.

principal, by his acts and conduct, estops himself from denying the agency.

12. **Who may be principal.**—Parties competent to make any other contract may make a contract of agency. A principal who is capable of making any other contract may employ an agent. If he is competent to act for himself, he may act through an agent in respect to the same thing. Sometimes, however, the question arises, "Can an incompetent principal act through a competent agent?" and on the other hand, "Can a competent principal act through an incompetent agent?" It is to be borne in mind that the principal is the real party in interest. He is the one who may enforce or be bound by the acts of the agent, and the contract made through the agent is really his. It is proper to say therefore that any person who is competent to make a contract may be a principal; that is, he may employ an agent and invest him with authority to act on his behalf in any legitimate transaction. One therefore who, owing to disability of any kind, is incompetent to contract in his own behalf may not act through an agent.

13. **Same subject—Infant principals.**—It has been said that "the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney."[9] If this proposition were true in all jurisdictions an infant could not be a principal and the act of any agent appointed by him would be void. Infants' contracts, however, are not

[9] Trueblood v. Trueblood, 8 Ind. 195. See also Armitage v. Widoe, 36 Mich. 124.

void, but voidable; that is to say, contracts of an infant may be avoided by him upon the plea of infancy, which is personal to the infant. The general rule on the subject would seem to be that the contract of an infant appointing an agent is to be considered in the same light as all his other contracts, namely: that they are voidable and not void; and that until the infant asserts the defense of infancy the acts performed by the agent on his behalf will be sustained.[10]

14. **Same subject—Insane persons.**—Like the contracts of an infant those of an insane person are, generally speaking, not void, but voidable at his option. The lunatic, however, cannot avoid his contract if the other party did not know of his infirmity and had no reason to suspect the lunatic's condition of mind, and acted in good faith, and if the contract has been so far executed that the parties cannot be restored to their original position.[11] As between the principal and agent, if the agent at the time of the appointment knows that his principal is an idiot, lunatic, or insane person, there is of course no contract of agency and the agent cannot therefore deal with the property or jeopardize the rights of the lunatic. In considering this question with regard to the rights and liabilities of third persons the courts will invariably inquire whether any benefit has accrued to the insane principal and will always endeavor to adjust matters in an equitable

[10] Patterson v. Lippincott, 47 N. J. Law 457; Sparman v. Keim, 83 N. Y. 245.

[11] Gridden v. Maxwell, 34 Kan. 8; Young v. Stevens, 48 N. H. 133; Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541.

manner and put the parties as far as possible in their original positions.

15. **Same subject—Married women.**—At common law a married woman was incapable of making a binding contract on her own behalf, and could not therefore appoint an agent to contract for her. Under modern statutes, however, the general rule is that a married woman is as free to contract as a man. She cannot, by reason of the marriage relation itself, bind her husband by her acts, without his consent, but with regard to her own affairs and property she may appoint agents for any lawful purpose. She may appoint her husband her agent with regard to her own property and affairs with the same effect as if she appointed a stranger.[12]

16. **Same subject—Corporations.**—Corporations are creatures of statute. Their powers are conferred upon them by the state. They must, it is true, act through individual officers and directors, but these officers and directors are not necessarily termed agents. They are in fact the legally appointed and constituted representatives of the corporation and through them the corporation acts. Within the powers granted to the corporation in its charter it is proper for the corporation to appoint agents for any legitimate undertaking, and when the appointment is made through the proper corporate officers having the requisite authority, the corporation is bound.[13]

17. **Same subject—Partnerships.**—Each partner

[12] Weisbrod v. Chicago & N. W. R. Co., 18 Wis. 35.
[13] St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192.

is the agent of the partnership within the proper limits of the partnership business. The partnership or any member thereof may appoint an agent to do any act within the scope of the partnership affairs and the act of the agent so appointed is binding upon the firm. Indeed it is usual and necessary that partners should have agents and clerks with authority to represent them, and each partner by reason of his relationship with his co-partner is competent and qualified to appoint an agent or agents in the interest of legitimate partnership transactions.[14]

18. **Same subject—Clubs—Unincorporated associations.**—Clubs and unincorporated associations do not come under the rules applicable to partnerships or to corporations. They act through certain officers and committees. These officers and committees may bind the individual members of the club or association who have authorized or assented to the transaction in question. In fixing the liability of the members of these clubs or associations for the act of an alleged agent, it must be shown that the members, sought to be held liable, had duly authorized or assented to the act of the agent. To say that a club or an unincorporated association may be a principal is to aver simply that such an organization may bind itself or its members by a contract made on its or their behalf by an agent when it is shown that the agent was duly appointed for a proper purpose.[15]

19. **Who may be agents.**—Any person other than

[14] Lucas v. Bank of Darien, 2 Stewart 280 (Ala.); see subject, PARTNERSHIP.

[15] Davison v. Holden, 55 Conn. 103.

a lunatic, imbecile, or a child of tender years, may be an agent.[16] The agent, as has been said, is a representative; his act is performed in his representative capacity. The principal is the party who really acts, the agent is simply the medium through whom he acts. It will be seen then that the contract of an agent with a third person is not a contract between the agent and the third person, but between the principal and the third person, and it is therefore stated that as between the principal and third parties it is not obligatory that the agent be one who is necessarily competent to make a contract on his own behalf. It is often possible, therefore, for a competent principal to act through an incompetent agent, that is, through an agent who himself lacks contractual capacity.

20. **Same subject—Infants and other agents.**—Infants, then, may act as agents and it would seem that unless advantage were taken of the tender years of an infant agent by the person dealing with him the principal would have no ground for avoiding responsibility and might also claim the advantage of the infant agent's contract.

It is possible also that a lunatic may be an agent. There are many simple acts of agency that may be performed by a person of unsound mind; but if the weakness of mind be apparent, or if the third party take advantage of the apparent incapacity of the agent, the latter's acts would not be binding upon the principal.

[16] Lyon & Co. v. Kent, Payne & Co., 45 Ala. 656, LEADING ILLUSTRATIVE CASES.

A married woman may also act as agent. Even at common law she could act as agent for her husband or a stranger, but under modern statutes she is freer than ever.[17]

Corporations, within the limits of the powers conferred upon them, may act as agents for individuals, firms, or other corporations;[18] and likewise partners may be given authority to act for a principal.[19]

21. **Joint principals.**—The power of appointing agents may rest in more than one person and the liability for the acts of an agent may be imposed upon more than one. It is not in all cases necessary that all the joint principals concur in the appointment of the agent. Partners are joint principals when the partnership, or any member thereof, appoints an agent within the scope of the partnership business. As has been pointed out, any member of the firm may make a binding contract of agency on the firm's behalf within the proper partnership limitations. But in other cases of joint principals, such as joint tenants, or tenants in common, there is no implied authority in one principal to act for all in appointing an agent.

Voluntary associations and clubs often act through agents in such manner that all of their members are held responsible as joint principals, but only those who confer the authority on the agent or assent to his acts or ratify them are bound thereby.[20]

22. **Joint agents.**—Authority may be conferred

[17] Cox v. Hoffman, 4 Dev. & B. 180 (No. Car.).
[18] Killingsworth v. Portland Trust Co., 18 Ore. 351.
[19] Deakin v. Underwood, 37 Minn. 98.
[20] Ash v. Guie, 97 Pa. St. 493.

on two or more persons jointly or severally. When the authority is conferred upon them severally, one of the agents so appointed may act. When the authority is conferred upon them jointly and the undertaking is of a private nature, all of the agents must join in the execution of the authority unless the principal has manifested a different intention.[21] Where the agency is of a public nature such, for example, as boards of commissioners, public committees, and the like, the rule is that all of the agents must meet and confer and a majority of them may decide. As has been said in a leading case: "It has long been perfectly well settled that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide."[22]

23. **Agent acting for two different principals.**— It is not consistent with the confidence which is necessarily reposed in an agent that he act for both sides in a transaction. He cannot perform his duty with a full measure of justice if he attempts to act for two opposing principals. Even if injury has not resulted to either party the agent is, nevertheless, under a temptation to deal unfairly and the law will not permit him, when he places himself in an inconsistent position, to recover from either principal. This is especially so where neither principal knew

[21] Hawley v. Keeler, 53 N. Y. 114.

[22] First Nat. Bank v. Town of Mount Tabor, 52 Vermont 87; see also Crocker v. Crane, 21 Wend. 211 (N. Y.); same case 34 Am. Dec. 228.

of the double agency.[23] It is also true where only one of the parties had knowledge of the dual relation.[24] But where both parties are informed in advance that the agent represents both sides it would seem that they could not afterwards repudiate the agency; and it is well settled that where the agent acts as a mere middleman and introduces the parties, who afterwards consummate the transaction between themselves, the agent is entitled to recover from both sides, if both sides employed him and agreed to compensate him.[25]

24. **Agency by estoppel.**—A person will be estopped to deny an agency where, by words and conduct, he has represented that another is his agent.[26] The estoppel works in favor of the third party who has dealt in good faith with the agent upon the strength of the representations made by the principal. It is not denied that in order to create an agency the assent of the principal to the formation of the relationship must be shown, but the assent may be manifested by words or conduct on his part which would give rise to an assumption in the mind of a third person that the relationship of principal and agent has been properly entered into. It is enough if the representation be so made that the third party has reasonable cause to believe, and, in fact, does believe, that it is meant to be acted upon, and he does act upon it.

[23] Farnsworth v. Hemmer, 1 Allen 494 (Mass.).

[24] Rice v. Wood, 113 Mass. 133, LEADING ILLUSTRATIVE CASES.

[25] Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, LEADING ILLUSTRATIVE CASES.

[26] Pole v. Leask, 33 L. J. Reports, Eq. 155 (Eng.), LEADING ILLUSTRATIVE CASES.

Agency by estoppel may also exist where an agent acts beyond the scope of his authority; for in the same manner, if the agent acts beyond the authority conferred, and the representations of the principal lead the third party to believe that the agent had the authority necessary to accomplish the act, the principal will be estopped to deny the agency. Thus, where an agent has been authorized to buy goods for cash and the principal has habitually sanctioned his purchases on credit, the principal's conduct is an implied representation of authority to pledge his credit in similar cases. In general, any conduct or action of the principal which has the appearance of holding out another person as his agent for any purpose is a sufficient representation of authority to create an estoppel within the scope of the agency represented to exist.[27]

25. **Agency from necessity.**—Necessity in any particular circumstance is never the basis of agency. The term "agency by necessity" or "agency from necessity" is, in a sense, a misnomer. The most important example of this form of agency is that which gives the power to a wife, in case of non-support, to pledge the credit of her husband in the purchase of necessaries. A husband is obliged to support his wife. His failure in this regard places his wife in a position to make contracts for the purchase of necessaries, and the third persons may enforce the contracts against the husband. The wife is forced by necessity to act as the husband's agent. It is a compulsory agency, or, rather, it would be

[27] Graves v. Horton, 38 Minn. 66; Johnson v. Hurley, 115 Mo. 513.

more precise to say that the law implies the authority in the wife to pledge her husband's credit for necessaries.[28]

It has been recently held in an important case in the state of New York that a husband is liable to one who furnishes necessaries for the support of his deserted wife and infant children; and, furthermore, that the husband is also liable to one who furnishes the wife with money to procure such necessaries. In the same case it was decided that a wife who has applied her separate estate to the discharge of an obligation resting primarily upon her husband, may recover from him the reasonable amounts which she has thus expended out of her separate estate in discharge of his obligation.[29]

26. **Other instances of agency from necessity.**— In many jurisdictions it is held that the parent is under a natural obligation to furnish necessaries for his infant children and if the parent neglect that duty any other person who supplies such necessaries is assumed to have conferred a benefit upon the delinquent parent and the law raises an implied promise to pay on the part of the parent.[30]

Another illustration is the power impliedly conferred on a railway servant in some states, in case of accident and emergency, to employ the services of a surgeon in behalf of the railway company for an injured employee; but this last point should not be considered a general rule, as the states are divided on the proposition.

[28] Benjamin v. Dockham, 134 Mass. 418.

[29] DeBrauwere v. DeBrauwere, 203 N. Y. 460.

[30] Van Valkinburgh v. Watson, 13 Johns. 480 (N. Y.).

It is to be borne in mind that in other matters the mere relationship of husband and wife, or parent and child, does not justify the wife or the husband, or the parent or child, to act for the other as agent, without express or implied authority. The contract of agency between these parties must be made in the same manner as if the particular relationship did not exist between them.[31]

27. **Contract of agency made by ratification.**— If, after an agent has performed an act on behalf of a principal without the requisite authority, the principal then assents to the act, this assent is called a ratification by the principal. The contract of agency may be as firmly made by ratification as by prior express authority. Indeed, ratification, once shown, has the same force and effect as a prior authority. When we speak of the relationship of principal and agent as formed by agreement or contract, we refer to the authority being expressly or impliedly given to the agent prior to the performance of his duty. When we speak of the relationship as being formed by ratification, we assume that the agent has already acted without any authority, but that the principal, having received full knowledge of the material facts, has adopted the act as his own and has thus ratified it. Two cases of ratification may be kept in mind: First, where the agent has no prior authority at all, and second, where the agent has prior authority but exceeds it. When, in the first case, the act is ratified, the ratification operates as an appointment of the agent, as well as

[31] See cases in note 8, p. 12.

a conferring of the authority to do the act ratified. In the second case the ratification operates as an extension of the authority so as to cover the act ratified.

28. **Meaning of ratification.**—The meaning of ratification may be sufficiently gathered from the foregoing paragraph. The Latin maxim which is found in many of the leading cases which discuss this important doctrine in the law of agency, expresses the pith of the subject as follows: *omnis ratihabitio retrotrahitur et mandato priori aequiparatur,* and means: "every ratification has a retroactive effect and is equivalent to a prior command." To ratify is to give validity to the act of another. Ratification operates upon the act ratified in the same manner as though the authority had been originally given. It is the first proceeding by which the principal becomes a party to the transaction.[32]

29. **Elements of ratification.**—The principal elements of ratification are, first, that the act performed by the agent must be performed on behalf of an existing principal; second, that the ratification must be the real assent of the principal to the act performed on his behalf, with full knowledge of the material facts and circumstances connected with the transaction; third, that the principal must be competent to give a binding assent; and fourth, that the act ratified must be legal.

30. **Same subject.**—The contract made by the alleged agent must have been made in the name of,

[32] McCracken v. City of San Francisco, 16 Cal. 591, LEADING ILLUSTRATIVE CASES.

and on behalf of, an existing and ascertainable person. The agent when dealing with the third party deals with him as an agent. The contract therefore sought to be made is one between the supposed principal and the third person. When full knowledge of the material facts and circumstances is brought home to the supposed principal and he adopts the acts of the agent, the contract made by the agent then becomes his own. He may enforce it or he may be held to liability thereunder.[33]

It follows, therefore, that where the supposed principal is undisclosed he cannot afterwards ratify the act of the alleged agent. If X makes a contract on behalf of Y, M cannot take advantage of it by an attempted ratification. If A makes a contract in his own name, but really on behalf of a principal whose name he does not mention and whose identity he does not disclose, the latter cannot ratify it because the third party never made and never intended to make a contract with him. If X is an absolute stranger to Y and has never had any authority for any purpose from Y, but he, nevertheless, makes a contract on behalf of Y, Y may ratify it. If X has received authority from Y to do a particular act, and X not only does that act but performs another act on behalf of Y, in excess of the authority originally given, Y may still ratify the act of X in excess of the authority conferred.

The supposed principal is not bound to ratify the act of the alleged agent. No authority ever having been given to the alleged agent by the supposed

[33] Foster v. Bates, 12 M. & W. 226 (Eng.).

principal, the latter is not called upon to adopt or ratify the unauthorized transactions. But when he does ratify the contract, it becomes his.[34]

31. **Same subject.**—A necessary condition of ratification is that the supposed principal shall have full knowledge of the material facts connected with the transactions of the agent, and that the existence of the contract, its nature and consideration, shall be known to him.[35] It is a general rule that one cannot be said to have ratified a wrongful act simply because he has remained silent when such silence induces no one to act to his prejudice. It is also true that no ratification will be implied from the fact that the principal retains the avails of an agent's act, where the agent acted outside of his actual and ostensible authority and the principal was ignorant that the agent transgressed the authority, and the avails of the agent's act do not include more than the principal was justly and legally entitled to receive. As an illustration it may be mentioned that where A has given authority to B to sell certain bonds for $5,000, and B, without authority and in order to induce a sale, guarantees the soundness of the bonds as an investment, the fact that A receives the purchase price without knowledge of the guarantee on the part of the agent does not bind A to the guarantee.[36] Though a collateral contract may have been the means by which an agent was enabled to effect the authorized contract, still the principal is not

[34] Combs v. Scott, 12 Allen 493 (Mass.).
[35] Wheeler v. Northwestern Sleigh Co., 39 Fed. 347.
[36] Smith v. Tracy, 36 N. Y. 79.

bound by the collateral contract made in excess of the agent's actual or ostensible authority, and not known to the principal when receiving the proceeds.

Where, however, an agent makes an unauthorized contract and after his discharge the principal commences action on the contract, he must assume the whole contract, and cannot enforce or rely only on the parts favorable to him. Once he assumes the contract as made by the agent he is bound by its full terms.[37]

32. **Form of ratification.**—As the authority of an agent may be conferred upon him without any formality in most cases, so the ratification may be made in the same manner. But if the agent performs an act which is required to be under seal, the ratification, in order to be complete, must be by an instrument under seal.[38] A seal always imports some evidence of consideration. While in many instances a seal is superfluous, yet when it is actually used it adds a certain formality to the transaction. If a seal is used unnecessarily it is a general rule that the instrument may be ratified by parol.

In cases coming under the Statute of Frauds, which provides that certain contracts, in order to be valid, must be in writing and signed by the party to be charged therewith or by his duly authorized agent, it is held in some jurisdictions that the ratification of the agent's act must be in writing. In other jurisdictions it is held sufficient if the ratification be by

[37] Shoninger v. Peabody, 57 Conn. 42, 14 Am. St. Rep. 88.

[38] Heath v. Nutter, 50 Me. 378; Hall v. Harper, 17 Ill. 82, LEADING ILLUSTRATIVE CASES.

parol, and the latter would seem to be the more general rule.[39]

33. **What acts may be ratified.**—Any act which one may legally perform may be the subject of ratification. Acts which are void and illegal and contrary to public policy cannot be ratified. Acts, however, which are merely voidable, may be ratified. A tortious act, if ratified with knowledge of the facts, may be capable of ratification. The power to ratify an act is as broad as the power to delegate authority. The test of the rule is that if a principal himself may lawfully perform the act which is sought to be made the subject of ratification, the act may be ratified.

34. **Validity of the act.**—The act to be ratified must be a valid and legal one; one which may be the basis of a proper and enforcible contract. It is a disputed question whether forgery may be the subject of ratification. If A forges the name of B to a promissory note, can B ratify the forgery? It has been held, in a leading Massachusetts case,[40] that where the principal has full knowledge of the facts and circumstances relating to the alleged forgery, he may ratify it. In an Indiana case[41] it was held that forgery could not be the subject of ratification. It was said that one who commits the crime of forgery does not assume to act as the agent of the person whose name is forged, and that where the act constitutes a crime it is difficult to see how the victim of the criminal act may adopt or ratify it, and

[39] McLean v. Dunn, 4 Bing. 722 (Eng.); Johnson v. Dodge, 17 Ill. 433; Long v. Hartwell, 34 N. J. L. 116.

[40] Greenfield Bank v. Crafts, 4 Allen 447 (Mass.).

[41] Henry v. Heeb, 114 Ind. 275.

that, upon considerations of public policy, the act of forgery could not be ratified. But in the Indiana case it was expressly stated that if the supposed principal, by acts or conduct, estopped himself from denying the ratification, and there was a new consideration to support it, the ratification would be binding even though the contract had its inception in forgery. Among other leading cases, illustrating the principle explained here, there is an important Ohio case to the effect that forgery cannot be ratified.[42]

35. **Who may ratify.**—Any one who is capable of being a principal, who has the capacity to make a contract of agency, is capable of ratifying an act when it is assumed to be done in his behalf without prior authority. The one who ratifies is the one who is bound by the act of the alleged agent and who can take advantage of that act, and he, therefore, must possess the necessary qualifications of contractual capacity in order to make the contract binding by ratification. Persons under legal disability, like infants and insane persons, may ratify when the disability is removed. A partner may ratify an act done on behalf of the firm within the scope of the partnership business.[43] An agent may ratify an act of a sub-agent if such act falls within the scope of the first agent's authority, and the sub-agent was properly appointed.[44] With regard to corporations, duly appointed officers or directors of the corporation may ratify a proper corporate act done on

[42] Workman v. Wright, 33 Ohio St. 405, LEADING ILLUSTRATIVE CASES.
[43] Forbes v. Hagman, 75 Va. 168.
[44] The Ironwood Store Co. v. Harrison, 75 Mich. 197.

behalf of the corporation. It is sometimes said that a corporation, after it is formed, may ratify the contract of one of its promoters. Strictly speaking, the term ratification would not apply in this instance, for at the time of the promoter's act the corporation was not legally in existence. The courts say, however, that after the corporation is lawfully organized it may adopt and assume the contracts of its promoters and this practically has the same effect as a ratification.[45]

36. **Effect of ratification.**—When ratification is once made it is irrevocable. When the principal has, with knowledge of the material facts, ratified the act of the agent he cannot afterward withdraw. Ratification, as already stated, has the same force and effect as if prior authority had been given to the agent, and the contract, when ratified, becomes the contract of the principal and places him under the same obligations and gives him the same rights as in the case of any other contract made by him.

37. **Same subject—As between principal and third party.**—It is well settled that the third party will be bound by the contract made by the assumed agent upon its ratification by the principal. The contract made by the assumed agent must have been a binding contract or a contract such as could have been made by the principal himself. The question is often presented whether or not the third party may withdraw before ratification. It has been held in a leading English case[46] that ratification by the

[45] McArthur v. Times Printing Co., 48 Minn. 319.

[46] Bolton Partners v. Lambert, L. R., 41 Chan. Div. 295 (Eng.).

principal is effective to bind the other party to the contract notwithstanding that the latter has in the meantime withdrawn his assent; that the ratification relates back to the time of the original transaction between the agent and the third party, and that after the original transaction, the principal had a reasonable time within which to adopt the agent's act. In a New York case[47] it has been said: "The principal, upon being informed of an act of an agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act or not, and so long as the condition of the parties is unchanged he cannot be prevented from such adoption because the other party to the contract may for any reason prefer to treat the contract as invalid and his election once made is irrevocable." This is a somewhat strained situation, because from the moment the assumed agent makes the contract the third party is bound, but the principal is not bound until he ratifies the act. There is a sharp conflict of authority on the proposition, but it may be stated to be the more generally recognized rule that the third person may recede from the contract at any time before ratification, on the theory that prior to the ratification there is no mutuality, and that if one party is free to be bound or not bound, the other must also be free.[48]

The case cited in the last note goes even farther than has been indicated. That case holds that the third party will be released unless he re-binds him-

[47] Andrews v. Aetna Life Insurance Co., 92 N. Y. 596.
[48] Dodge v. Hopkins, 14 Wis. 686, LEADING ILLUSTRATIVE CASES.

self after the principal has sought to adopt the agent's act; in other words, that a second assent is required from the third party.

38. **Same subject—As between principal and strangers.**—Ratification cannot be allowed to defeat the intervening rights of strangers to the transaction. The principal cannot, for example, ratify an unauthorized contract for the sale of property made by an agent and thus defeat a sale of the same property made by himself. Ratification by a principal is only effective so long as he is in a present position to perform or comply with the contract of the agent.

39. **Same subject—As between principal and agent.**—Prior to ratification there is no liability of the principal for the unauthorized act. If the principal never ratifies the agent may incur a personal liability as is explained in the next section. But when the agent's act is ratified it becomes the act of the principal and the agent is no longer bound.[49] If, however, the agent practices a fraud on his principal and thus induces the principal to ratify, the agent is not relieved of responsibility to the principal. Furthermore, where the principal is kept in ignorance of the true facts of the transaction by reason of the negligence of the agent, the agent is not relieved of liability to his principal.[50] While it is true that when the agent has overstepped his authority he becomes liable to his principal for such losses as are the direct and

[49] Triggs v. Jones, 46 Minn., 277.

[50] Bank of Owensboro v. Western Bank, 13 Bush 526 (Ky.).

natural consequences thereof, whether his motives be good or bad, still it is also true that the agent is released from liability when the principal, with knowledge of all the material facts, ratifies the agent's departure from his duty.

40. **Same subject—As between agent and third party.**—Ratification by the principal of the unauthorized contracts made by the agent for him will ordinarily relieve the agent from liability, so far as the unauthorized contract is concerned. There may, however, be instances wherein even after ratification the agent still remains liable to the third party, as where an agent is guilty of conversion. In these cases, even though the principal seeks to ratify the act of the agent, the latter will, nevertheless, remain liable; for the principal having had no authority to commit the conversion he cannot indirectly confer such authority on the agent by ratification.[51] If the principal never ratifies the agent may be personally liable as explained later in Sections 106 and 107.

41. **Delegation of authority by agents.**—There is another Latin maxim in the law of agency—*delegata potestas non potest delegari*—which means that delegated authority cannot be delegated. That is to say, an agent to whom authority is delegated cannot delegate that authority to another.[52] This, however, is not an absolute and positive rule in all cases. In the first place the principal may authorize the agent to delegate his authority and intrust the performance of the duty to sub-agents. Or the

[51] Stephens v. Elwall, 4 M. & S. 259 (Eng.).

[52] Appleton Bank v. McGilvray, 4 Gray 518 (Mass.); Lynn v. Burgoyne, 13 B. Mon. 400 (Ky.).

act itself may clearly require that the authority be delegated to others. When this is the case the agent may, within the proper scope of the employment, appoint a sub-agent and the act of the latter will be binding on the principal. The principal may ratify the act of the sub-agent as well as the act of the agent.

42. **Same subject—Authority involving judgment and discretion.**—Where the act to be performed requires the exercise of personal judgment and discretion or where the principal evidently trusted to a personal performance of the act by the agent, the authority of the agent cannot be delegated to others without the express or implied consent of the principal. The reason of the rule is that the principal relies upon and desires the benefit of a particular agent's judgment, discretion, experience, ability, and skill, and it would be contrary to sound policy to hold that under such circumstances the agent could turn over to another a responsibility which was entrusted to him personally. It is evident that if such power could be delegated a principal would be at the mercy of an unknown and perhaps untrustworthy representative. Nor can the agent assign his contract of agency. The contract is exclusively personal and the principal would not be obliged to recognize the substituted agent. In considering the question of delegated authority, therefore, the courts will look to the nature of the act to be performed by the agent and the customs, if any, prevailing in the particular business or locality.

43. **Same subject—Mechanical and ministerial duties.**—There is usually an implied authority in an agent to appoint a sub-agent where the act to be performed is of a mechanical or ministerial nature, or where it is evident from the very character of the undertaking that the employment of a sub-agent is a necessity.[53] It is a general rule that where the sub-agent is properly appointed he is to be regarded as the agent of the principal. On the other hand, where the sub-agent has not been duly appointed on behalf of the principal the agent is responsible for the sub-agent's acts. If the principal in any event becomes bound to third persons by reason of the acts of an unauthorized sub-agent, the agent is responsible to the principal.

44. **Same subject—Sub-agents.**—Something has been said already under this head. A case in the United States Supreme Court which shows the very striking conflict between a number of states holding one doctrine and a number of states holding a contrary doctrine, bears upon the point of the responsibility of a sub-agent.[54] The doctrine of many of the states, as shown in that case, is that the liability of a bank in taking, at New York, certain drafts from a bank at Pittsburgh for collection from a drawee at Newark, N. J., extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent with proper instructions, and that the Newark bank was not its agent but the agent of the

[53] Williams v. Woods, 16 Md. 220.

[54] Exchange National Bank v. Third National Bank, 112 U. S. 276.

Pittsburgh bank, so that the New York bank was not liable for the default of the Newark bank, due care having been used in selecting that bank.

The contrary doctrine of many other states is shown to be that a bank receiving a draft or bill of exchange in one state for collection in another state from a drawee residing there, is liable for neglect of duty occurring in its collection whether arising from the default of its own officers or from that of its correspondent in the other state or the agent employed by such correspondent, in the absence of any express or implied contract varying such liability. The United States Supreme Court has adopted the latter view.

A lawyer who takes certain claims for collection and sends them to a correspondent attorney out of town is liable for the fraud and embezzlement of the correspondent attorney unless the first attorney has received authority from his client to engage the correspondent.[55]

[55] Cummins v. Heald, 24 Kan. 600.

CHAPTER III.

TERMINATION OF THE RELATION.

45. **Methods of termination.**—As the formation of the relation of principal and agent depends fundamentally upon the will of the parties, the relation in the same way continues and so it is terminated. There are cases, however, wherein the relationship is terminated by operation of law. In general, there are three modes by which the relationship is terminated: First, by express or implied limitation; second, by the act of the parties; and third, by operation of law. When reference is made to the termination of the relationship by limitation it is understood that the period of time for the fulfillment of the agency has been reached, or that the time allowed for the performance of the particular act has passed. In the case of an agent being engaged for a particular purpose the agency comes to an end at once upon his accomplishment of the object.[56]

46. **Same subject—By original agreement.**—Where there is an express agreement between the principal and the agent, limiting the agency to a definite time, the relationship is terminated when the time fixed has been reached. Notice of the termination of the agency under such conditions is

[56] Moore v. Stone, 40 Iowa 259, LEADING ILLUSTRATIVE CASES; Ahern v. Baker, 34 Minn. 98.

generally unnecessary. Should the parties, however, continue their relationship by mutual consent after the expiration of the stated period it will be presumed that the original contract is continued for a further like period. But the contract between the parties must be looked at and, as in all other contracts, the element of intention of the parties thereunder will play a strong part in its construction.

47. **Same subject—By subsequent agreement.**—An agreement made between the parties subsequent to the formation of the relation, cancelling and rescinding their original agreement, will, of course, put an end to the agency. As in other agreements there must be present in the rescinding contract the essential element of consideration. So, too, if either party abandons the contract of agency, or his rights thereunder, this will be deemed sufficient to terminate the relation.

The subsequent agreement will not be effectual, however, to terminate the agency if the power conferred on the agent be coupled with an interest.[57]

48. **Same subject—By revocation of authority.**—Where an agency has been properly created it is a general rule that it may be terminated by the principal by revocation of the authority conferred and by the agent by renunciation of the appointment. There are certain exceptions which will be noted below. It is the general rule that all simple agencies, so called, are revocable at the will of the principal. But in cases of simple agencies the principal cannot always relieve himself from the dam-

[57] Chambers v. Seay, 73 Ala. 372. See also § 51.

ages, if any, incurred by a breach of the contract of employment; and vice versa the agent, notwithstanding his renunciation, may be held responsible for damages to the principal. Simple agencies are distinguished from agencies or powers "coupled with an interest," as will be shown.

If I authorize a real estate agent to sell my house for $5,000 and agree to pay him a commission of 2½ per cent at the time of sale, I may revoke the agency and cancel the authority at any time without incurring liability to the agent. If, however, I say to the agent that I desire him to advertise the sale of the house in certain newspapers and that I will pay him his expenses as well as his commission, I shall be liable to the agent for his expenses if I revoke the agency before sale.[58]

49. **Same subject.**—The principal's right to revoke is distinct from his power to revoke. He may, in many cases, exercise the power of revocation, but he may be right or wrong in so doing; that is, right or wrong in the eyes of the law. A principal is generally in a position to so exercise his power as to deprive the agent of the means and authority of accomplishing the purpose of the agency. In the cases of contracts of employment where the contract covers a period of a year, for example, at a stipulated weekly, monthly, or yearly compensation, the principal has the power to terminate the employment by discharging the agent but he has not a complete legal right to do so, for in an action brought by the agent under the contract the prin-

[58] Blackstone v. Buttermore, 53 Pa. St. 266.

cipal will be compelled to pay damages for the breach thereof.

As held in the Pennsylvania case cited in footnote 58, even where the principal confers authority upon an agent by power of attorney to sell lots and the power contains a clause that the same is irrevocable prior to a certain day, nevertheless the principal has the power to revoke the agency prior to the expiration of the time limit. The agent, however, has a right of action for damages under the contract.[59]

Where a positive and absolute contract to employ an agent for five years is made it must be carried out. If the principal exercises his power to revoke the contract, the agent may hold the principal liable thereunder even where the principal was obliged by law to discontinue his business in the particular state.[60]

It has been held, as has already been indicated, that where a contract of employment for a specified period, say for one year, is made and at the expiration of the period the parties continue their relations as under the original contract, the law will presume a continuance for another year, and a revocation of the agent's employment will subject the principal to damages.[61]

50. **Same subject—The element of good faith.**—It was laid down in an important case[62] that the question of good faith on the part of the principal

[59] Blackstone v. Buttermore, 53 Pa. St. 266.
[60] Lewis v. Atlas Mutual Life Ins. Co., 61 Mo. 534.
[61] Standard Oil Co. v. Gilbert, 84 Ga. 714.
[62] Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.

plays a strong part in deciding the question of his liability or non-liability in revoking the agency. In the case mentioned the agent had been employed to sell certain railroad supplies on a commission basis, and after great labor and expense on his part he was unsuccessful. The agency was terminated and shortly afterwards the principal dealt with certain parties with whom the agent had been previously negotiating. It was determined that if the act of the principal in revoking the agent's authority was in good faith the agent could not recover. It was said that a broker always works on a contingency and that his reward comes only with success. It matters not, it was said, that ultimate good resulted from the efforts of the agent to the principal, after the termination of the agency. The controversy was decided on the particular ground that, the agency being a simple agency, it was revocable at the will of the principal acting in good faith.

51. **Same subject—Power coupled with an interest.**—When the power given to an agent is coupled with an interest the principal has neither the right nor the power to revoke the agency. What is a "power coupled with an interest?" In a leading case upon the subject[63] it is said that such an interest "must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. * * * A power coupled with an interest is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we

[63] Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174 (U. S.).

are to understand by the word interest an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences and therefore cannot, in accurate law language, be said to be coupled with it."

The point may be illustrated in a simple way. If I employ an agent to sell a quantity of lumber at a particular price and I agree to pay him a commission of 20 per cent upon the consummation of the sale, I am not giving the agent an interest in the subject matter of the agency, namely, in the lumber, but simply an interest in the result of the sale. This, therefore, is a simple agency and is revocable at the will of the principal. I am not conferring a power upon the agent and at the same time giving him an interest in the subject matter of the agency and it is not, therefore, a power coupled with an interest. If, however, I word my contract with the agent so as not only to give him a power to sell but also to transfer and assign to him a particular interest in the lumber itself, as compensation for the work he has performed or is to perform, I am giving him an interest in the very subject matter of the agency and so the agent has a power coupled with an interest. I have neither the right nor the power to revoke this authority. The agent has an interest in the subject matter and may assert it and he cannot be deprived of his rights thereunder by an attempted revocation.[64]

[64] Walker v. Denison, 86 Ill. 142.

52. **Same subject—Notice to third persons.**—In the event that an agency is revoked by the principal, the latter is obliged to give notice of such revocation to third persons who have dealt with the agent knowing of the relationship. It is a familiar principle of law that when one has constituted another his agent to carry on his business, the authority of the agent to bind his principal continues after an actual revocation until notice of the revocation is given or brought home to persons who have been accustomed to deal with such agent.[65]

Where one has dealt with a general agent knowing him to be such he will be justified in dealing with him again in the absence of notice of revocation from the principal.[66] With regard to special agencies it is said that notice of revocation of the authority is not necessary unless the agent has already entered upon the performance of his duty; for the special agent has not, in previous transactions, been held out as the legally authorized representative of the principal and he has generally but one specific transaction to carry out.

53. **Renunciation by agent.**—As the principal generally has the power to revoke except in the case of a power coupled with an interest, so the agent has the power to renounce his appointment. The renunciation must, of course, be communicated to the principal in some manner, but it may also be implied from the conduct of the agent as by his abandonment of the agency.[67] The principal is entitled to

[65] McNeilly v. Continental Life Ins. Co., 66 N. Y. 23.

[66] Claflin v. Lenheim, 66 N. Y. 301.

[67] Stoddart v. Key, 62 How. Pr. 137 (N. Y.).

reasonable notice of renunciation and often where the agent is not bound by a definite contract his sudden determination to renounce may result in serious loss to the principal. The agent is liable for damages where he renounces in violation of an express contract for a definite period or for the accomplishment of a particular purpose. If, however, his renunciation is not in breach of his contract he will be entitled to compensation.[68]

54. **Termination by operation of law.**—The rules applicable to the termination of the relationship of principal and agent by operation of law are grouped generally under four heads, as follows: First, by death; second, by insanity; third, by bankruptcy; fourth, by the outbreak of war between the country of the agent and the country of the principal.

55. **Same subject—Death.**—As a general rule all simple agencies are terminated by the death of either the principal or the agent. There must in all cases be in existence a principal who is to be bound, otherwise there cannot be an agency. As an agency is a personal trust and authority cannot be delegated without the express consent of the principal, so upon the death of the agent the authority cannot be continued by another agent and the relationship between the principal and the agent is terminated. Where there are two or more joint principals usually the death of one terminates the agency. Even where the agent and the third party are ignorant of the death of the principal, nevertheless, where the agency is a simple one, the death of

[68] Britton v. Turner, 6 N. H. 481; McClay v. Hedge, 18 Iowa 66.

the principal, *ipso facto,* terminates it.[69] If, however, the power be one coupled with an interest it survives the person giving it and may be executed after his death.

56. **Same subject—Insanity.**—With regard to the insanity of the principal it is a general rule that the same revokes the agency for the reason that there is no competent principal in existence on whose behalf the agent may contract. The insanity of the agent, of course, occurring after his appointment is a ground for the termination of the relation, for third parties dealing with an agent *non compos mentis* cannot make binding contracts through him with the principal.

If the power be one coupled with an interest, the insanity of the principal does not terminate the agency, or if third parties, before the insanity of the principal, have parted with anything of value in dealing with the agent in good faith, relying on an apparent authority of the agent, the insanity of the principal does not necessarily terminate the agency, and the third parties' rights will be preserved by the court. It seems to be held in some jurisdictions that an adjudication that a principal or agent is insane would amount to constructive notice to all persons of the termination of the agency.[70]

57. **Same subject—Bankruptcy.**—As the bankruptcy of an individual by force of law places his assets and property in the custody of the court for the benefit and protection of his creditors, it follows

[69] Weber v. Bridgman, 113 N. Y. 600, LEADING ILLUSTRATIVE CASES.
[70] Davis v. Lane, 10 N. H. 156.

that the bankruptcy of the principal terminates the agency so far, at least, as relates to rights or property of which the principal is divested by the bankruptcy. The general rule in this instance follows, that if the power be one coupled with an interest the bankruptcy of the principal does not terminate the relation of agency with regard to that particular power.[71]

The bankruptcy of an agent may not always terminate the agency, for, as has been repeatedly pointed out, the agent deals simply in his representative capacity and his bankruptcy will not always interfere with the performance of his duty. His bankruptcy, however, does in general interfere with and prevent his receiving money of his principal; but with regard to other acts not connected in any way with his personal estate the agency would continue.[72]

Some text writers on the subject make it appear that the termination of the agency by the bankruptcy of the agent seems to result from the implied intention of the principal rather than from the bankruptcy itself. Still there seems to be no good reason why the bankruptcy of the agent should prevent him from making a binding contract on behalf of his principal.

58. **Same subject—War.**—Every kind of trading between two countries at war is prohibited. War, therefore, between the country of the agent and the country of the principal terminates or, at least, sus-

[71] Story, Agency, § 482.

[72] Audenried v. Betteley, 8 Allen 302 (Mass.).

pends the agency during the continuance of hostilities. It was said by Judge Bradley of the United States Supreme Court, in the case of Insurance Co. v. Davis, 94 U. S. 425 (1877):

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition it must follow that no active business can be maintained either personally or by correspondence or through an agent by the citizens of one belligerent country with the citizens of the other." But it has been held in a New York case[73] that the suspension of commercial contracts by war has no application to life insurance contracts unless the policy insures against death while the insured is engaged in the military service of the enemy's country.

59. **Same subject—Marriage.**—While at common law the marriage of a woman would revoke an agency as to her separate estate, this result would not follow under the modern statutes of most jurisdictions affecting the rights of married women. It has already been shown that married women have practically the same rights as men. The marriage of an agent has in general no bearing upon the relationship of principal and agent. The marriage of a principal has likewise no effect toward terminat-

[73] Sands v. New York Life Insurance Co., 50 N. Y. 626.

ing an agency. It is sometimes said, however, that in particular cases the marriage might affect the agency as, for example, where a man authorizes an agent to sell his lands and before the sale he marries. By the marriage his wife acquires a dower right in his real estate and this dower right must be released before a complete sale will become effectual.[74]

[74] Henderson v. Ford, 46 Texas 627.

CHAPTER IV.

THE AUTHORITY CONFERRED; ITS NATURE AND EFFECT.

60. **Express authority.**—It has been pointed out that the authority of the agent may be express or it may be implied. The manner in which the authority is conferred is important, because of the consequences which follow upon whether the one method or the other is used.[75] With regard to express authority there is little occasion for uncertainty as to its extent. The time and place and manner of executing the authority, and the conditions and limitations imposed, are clearly defined. The extent of the express authority may be general or special. There can be little doubt of the limits of the agent's authority when the appointment is in writing and is unequivocal, but it is to be borne in mind, as has been stated heretofore, that express authority to an agent may be given by parol as well as in writing. Persons dealing with an agent who has been given express authority are bound by the extent and limitations of the authority conferred.[76] When third persons deal with an agent knowing that his authority has been conferred in writing or has been given to him by an instrument under seal, they are bound

[75] Loudon Savings Fund Society v. Hagerstown Savings Bank, 36 Pa. St. 498, LEADING ILLUSTRATIVE CASES.

[76] Porges v. U. S. Mortgage & Trust Co., 203 N. Y. 181; Craighead v. Peterson, 72 N. Y. 279.

by the written or sealed instructions. The burden of proof is on the third party dealing with an agent to show that the agent has acted within the scope of the authority conferred.

61. **Implied authority.**—Authority is very frequently left to be inferred or implied from the words and conduct of the principal or from the circumstances surrounding the particular case. Care must be exercised not to infer too much from the known facts, and in attempting to infer authority of an agent by reason of the words, conduct or actions of the principal, a reasonable and fair construction must be placed upon these facts and circumstances and the courts will not permit a strained and unreasonable construction. It has been stated that the authority which is to be implied cannot exceed the natural and legitimate interpretation of the facts from which it is inferred. Implied authority cannot result from mere presumption or hazard or from matters of convenience. Certain implications are permissible even where the authority given to an agent is express, as, under an express authority, an agent has implied authority to do whatever is reasonable and necessary in the proper execution of his agency. And so also an agent acting under express authority has implied authority to act according to known usages and customs.

62. **General and special authority.**—It has been shown that the general agent is distinguished from the special agent and that the distinction arises by virtue of the extent of the authority conferred. General authority as well as special authority may

be expressly given or it may be implied from facts and circumstances. The authority is general where the principal has represented that the agent is authorized to act in a general manner in relation to some matter, or in relation to a particular class of business. The authority is special when the principal has authorized the agent to act in a particular matter or in a particular manner in accordance with specific instructions.[77]

63. **Distinction between authority and instructions.**—When authority is conferred upon an agent the principal may properly impose certain restrictions and limitations upon the exercise of the authority, and such restrictions and limitations will be binding upon such third persons as have notice of them. When authority is once conferred the agent may act within the reasonable and proper limitations of that authority. When secret instructions or limitations are placed upon the authority and are unknown to the third persons with whom the agent deals, such secret instructions or limitations are not binding upon the third party, and when the agent acts within the proper and reasonable boundaries of the authority conferred he is, so far as the third persons are concerned, properly performing his duty.[78] Secret limitations and instructions, when not consistent with the authority conferred, are likewise not binding upon the third party. Where the agent transgresses his instructions or goes beyond the limitations of his authority, he nevertheless will

[77] Butler v. Maples, 9 Wall. 766 (U. S.), LEADING ILLUSTRATIVE CASES.
[78] Towle v. Leavitt, 23 N. H. 360.

bind his principal as to third parties when his acts are within the reasonable scope of the authority conferred or are such as the principal has permitted third parties to conclude are within the scope of that authority.[79]

It is not to be denied that the instructions given to an agent constitute, at times, the very authority itself. But instructions which go beyond the ostensible and apparent authority of the agent are usually not binding upon third persons who are ignorant of the instructions. It is not always what the principal says, but what he does or what he permits to be done, which defines the authority of the agent. Instructions which are contrary to known usage and custom are not binding upon third persons. The rules of conduct which a principal seeks to impress upon the exercise of the authority of his agent are not binding upon third persons, especially where such rules are inconsistent with law, or are unusual and arbitrary. Secret instructions may be proper as between the principal and the agent, but they cannot be expected to affect third persons who are ignorant of them, unless they be reasonable.[80]

64. **Extent of general and special authority.**— Where the agent has received general authority all persons dealing with him are justified in concluding that he may do whatever is usual in the exercise of his authority. The rights of third persons cannot be impaired or affected by the fact that the principal has placed secret limitations upon the exercise

[79] Bryant v. Moore, 26 Maine 84.

[80] See case in note 78, p. 51.

of the authority. With regard to the extent of special authority conferred upon the agent, it is generally true, from the very nature of the authority, that the principal may restrict the authority by certain limitations. The agent being a special agent and his authority being a special authority, the third party should be more careful in dealing with him, as all proper limitations placed upon that authority by the principal are binding upon the third person.[81] If, however, the principal has by acts and conduct permitted it to be inferred that the agent has greater authority than actually given, the limitations will avail him nothing.

Generally speaking, therefore, unknown limitations placed upon the authority of the general agent or placed upon an agent who has been given general authority are not binding on third persons when the limitations unreasonably restrict the authority. Whereas with regard to special agents or agents who have been given special authority, limitations which are consistent and proper in the particular case, whether known or unknown to the third person, are binding upon the latter.

65. **Construction of the authority—When in writing.**—The agent is under obligation to conform strictly to the authority conferred. He impliedly undertakes to obey the instructions given to him by his principal and he is liable to his principal in damages for any loss occasioned by his breach. The object in the mind of a third person in dealing with an agent should be to ascertain the intention of the

81 Hubbard v. Ten Brook, 124 Pa. St. 291.

principal in conferring the authority on the agent.[82] It is true this is not always an easy matter. The question therefore is one of construction and interpretation.

When the authority is in writing it is usually conferred by what is known as a power of attorney. This is an instrument wherein and whereby the principal employs or authorizes the agent who is named, to do and perform a certain act or a certain class of acts; it is usually signed and witnessed or acknowledged by the principal. No particular form of power of attorney is prescribed. When it is delivered to the agent it constitutes his authority. The first general rule to be applied in the case of a power of attorney is that it is to be strictly construed. Not that there is to be any unfair construction of it, but it must appear on the face of the instrument by a reasonable and fair interpretation of the whole that the authority is to be found there. The rule may be stated that a written power of attorney is strictly construed and confers only such authority as is expressly stated or as is permitted by necessary implication. When general words are used following the particular authority conferred they do not add anything to the particular authority, but denote only that the agent may do any act necessary to accomplish the particular purpose.[83]

66. **Same subject—When not in writing.**—When authority is conferred other than by a power of attorney the general rule is that the authority is

[82] Kornemann v. Monaghan, 24 Mich. 36.
[83] Craighead v. Peterson, 72 N. Y. 279.

to be liberally construed. That is to say, fair inferences may be drawn from the authority with a view toward accomplishing the object at hand. The question is one of intention, and reasonable inferences are permitted to be drawn when the same are consistent with the authority conferred and are not contrary to the known usages of a particular locality or of a particular business. Sometimes it is said that letters or telegrams from a principal to an agent are liberally construed for the reason that they are drawn in a hurried manner and leave a great deal to inference; but this liberality of construction is in favor of the third party, the letters or telegrams being strictly construed as against the principal. Where a letter, however, purports to be in the nature of a power of attorney it would seem that the same rules would apply as to a formally drawn power of attorney.[84]

67. **Same subject—Ambiguous authority.**—It not infrequently happens that the terms which express the authority conferred are construed in one manner by the principal and in another by the agent, or it may happen that the terms of the authority conferred are capable of more than one construction. In such cases good faith seems to be the test in the construction of the authority. If the act done by the agent is not done in bad faith and seems fairly to be warranted by the terms of the authority, it is generally held that the principal is bound, although the construction placed upon the authority by the agent was not intended by the principal. The prin-

[84] Wood v. McCain, 7 Ala. 800.

cipal must stand the consequences if he fails to make his instructions clear.[85] The ambiguity in the authority conferred may arise from the words of a written power of attorney as well as from those of an oral authority; but in general a reasonable and fair interpretation of either written or parol authority, where the parties act in good faith, will be upheld.

68. **Construction of implied authority.**—When authority in an agent is implied from the acts and conduct of the principal, the general rule of construction is that the authority cannot be made broader than fair inferences will warrant. The authority inferred must be no greater than what naturally follows from the conduct and acts of the principal. It having been established that an agency has been created by implication, it is necessary to properly interpret the authority so inferred. The principal having neglected to limit the authority of his agent, or having permitted the agency to arise by his acts and conduct, it is but proper that third parties should have the benefit of any doubt and should be permitted to construe the authority strictly against the principal. If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a similar nature; if it arises from the general habits or course of dealing between the parties it must be confined in its operation to dealings of the same kind; if it arises from the previous employment of the agent

[85] Ireland v. Livingstone, L. R. 5 H. L. 395; LeRoy v. Beard, 8 How. 451 (U. S.); Winne v. Niagara Fire Insurance Co., 91 N. Y. 185.

in a particular business, it is, in like manner, to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apparently created.[86]

69. **Construction of particular powers.**—In the broad and complex business dealings of the present day there are many powers which may be conferred upon agents. There are peculiar rules applicable to the construction of certain powers. It would be manifestly impossible within the scope of this article to treat of every power which may be conferred upon an agent and to explain the rules which may have application to each particular power. It will be sufficient if we treat of the more common powers conferred and the construction placed upon these powers, and it is apprehended that the general principles may be applied in determining what rules of construction should be used and relied upon in determining the interpretation to be placed upon the power conferred upon the agent.

70. **Agent authorized to sell land.**—It is of frequent occurrence that an agent is invested with authority to sell his principal's real estate. There is a distinction to be noted between the authority given to an agent to sell and the authority given to an agent to offer for sale. When the authority is given to an agent to sell land in the sense that he is authorized to convey it, he must be invested with the power by a document in writing. In states where there are recording acts and the property

[86] McAlpin v. Cassidy, 17 Tex. 449.

stands on the record in the name of the principal, it is necessary that the power to the agent be in writing, and subscribed and acknowledged by the principal, and recorded in the same office where deeds are recorded. Most states have recording acts. The statute in each state referring to real property must be looked up, and in nearly all the states the Statute of Frauds is in force, whereby it is generally provided that a valid contract for the sale of real estate must be subscribed by the seller or his lawfully authorized agent. As it is not necessary in most jurisdictions that a contract for the sale of land be under seal, the principal may give an agent parol authority to make the contract. The principal then carries out the contract by executing a conveyance to the third party. The principal therefore may by parol authorize his agent to sell his property, but the agent cannot by parol make a binding contract to sell the property. Merely placing one's property in the hands of a broker for sale gives the agent authority to offer the property for sale, but does not authorize him to convey it or, generally, even to make a contract to convey it. A broker's duty ends when he procures a purchaser at the price stated by the principal. A deed of conveyance made by an agent without the authority of a written power of attorney passes no title. But it has been held that where the agent had authority in writing to sell, his conveyance, though ineffectual to pass title, was a good contract to convey, and so the principal was directed to specifically perform the contract.[87]

[87] Lyon v. Pollock, 99 U. S. 668.

A power of attorney from two or more principals, joint in form, does not confer authority on the agent to act in relation to the property of one of the principals alone. A written power of attorney to an agent to sell the real estate of the principal and execute a deed without restrictions is construed to give the agent authority to convey with a warranty clause where that is the usual method of conveyance.[88]

71. **Agent authorized to sell personal property.**— It is not necessary that a power to sell personal property be conferred by a written instrument. Authority to sell is not to be inferred from the mere fact that the agent has possession of the property. It is true, however, that where the owner has clothed an agent not only with possession, but with the indicia or evidences of ownership, he will be bound by a sale. Authority to sell personal property may be express or it may be implied from the acts or conduct of the principal. Such authority implies the power in the agent to make the necessary and usual terms and conditions of sale; and generally it also places in the agent the power to warrant the principal's title, especially where this is usual and customary. Furthermore, possession of the property by the agent authorized to sell it implies authority on the agent's part to fix the purchase price. Mere authority to sell does not warrant the third party in paying the agent if the property is not delivered at the time of the sale.[89] If the agent has authority to sell for cash, he cannot sell on credit; nor can he

[88] LeRoy v. Beard, 8 Howard 451 (U. S.).
[89] McKindly v. Dunham, 55 Wis. 515, LEADING ILLUSTRATIVE CASES.

exchange the property for other property. Once the agent has made a sale he has generally no authority to rescind it; the principal is bound by it and he alone can rescind. It has been held that oral warranties made by an agent in the sale of an automobile, which warranties were also contained in a printed circular shown by the agent in making the sale, this circular having been issued at the instance of the principal, were binding upon the principal.[90]

Where an agent is entrusted with personal property with no direct or implied authority to sell the same he cannot pass good title to a purchaser even though the purchaser act in good faith, but where there was an evident intention to make a sale an innocent purchaser will be protected.[91]

72. **Agent authorized to purchase.**—An agent given authority to purchase goods for cash cannot purchase on credit unless it be the usage and custom in the particular trade or business or in the particular locality or unless he have express power to buy upon credit.[92] An agent authorized to buy goods cannot buy from himself, as an agent authorized to sell cannot sell to himself.[93] This would be contrary to the fiduciary relationship existing between principal and agent, and to the rule that one in such fiduciary relationship cannot take advantage of his position to the detriment of the other party. It is true that where an agent is authorized to buy and he is not furnished with the necessary funds

[90] Lewis v. Pope Motor Car Co., 206 N. Y. 402.
[91] Smith v. Clews, 105 N. Y. 283.
[92] Komorowski v. Krumdick, 56 Wis. 23.
[93] Heckscher v. Edenborn, 203 N. Y. 210.

he may buy on credit. He may also agree upon usual and reasonable terms of purchase.

73. **Authority to make negotiable paper.**—In order that an agent may properly bind his principal by the making or endorsement of negotiable paper he must have authority for that purpose. Such authority does not arise by reason of the relationship of principal and agent. The authority is not to be lightly inferred. It is not of course necessary that the authority to make or endorse negotiable paper be in writing. Where there is doubt the authority is strictly construed as against the agent and the third party. So an agent in buying goods, cannot, without authority from his principal, issue negotiable paper for the purchase price. The fact that the authority to issue or endorse negotiable paper is strictly construed in favor of the principal is not to be considered a denial of the proposition that the authority may be lodged in the agent by implication.[94] The acts and conduct of a principal which would amount to an estoppel in connection with the issuing or endorsement of commercial paper would be as binding upon the principal in this relation as in any other matter. When payment is made to an agent by check and the agent has been in the habit of endorsing the principal's name on checks and depositing them in his bank account, and he has accounted from time to time to his principal and the principal has full knowledge of the fact of the agent's receiving and endorsing checks, it has been held that payment by check to the agent in a

[94] Jackson v. National Bank, 20 S. W. Rep. 802 (Tenn.).

subsequent transaction is payment to the principal. But generally speaking an agent has no right to endorse a principal's name without an express or implied authority.[95]

74. **Agent to manage business.**—An agent to manage a business can only bind his principal for whatever acts are done in the regular and known and proper transaction of that business. It is generally held that an agent employed to manage a retail business has no authority to sell out the entire business in one transaction. Nor has such agent authority by reason of his position to issue or endorse negotiable paper. His authority in this connection must be clearly established. There is no authority by implication in the agent to borrow money on behalf of the principal in connection with the business or to mortgage the principal's property, and it is not permitted the agent to make any unusual contract or to enter into any undertaking or obligation outside of the usual scope of the business.[96]

75. **Execution of the authority by the agent.**—It is the general duty of the agent to act within the scope of the authority conferred upon him by the principal and to act in the name of and on behalf of the principal. It has already been stated that when the agent acts beyond the authority conferred he cannot bind his principal. It is often a difficult question to ascertain just when an agent has exceeded his authority. The burden of proof is always upon the person dealing with the agent to show that

[95] Morrison v. Chapman, 155 App. Div. 509 (N. Y.).
[96] Brockway v. Mullin, 46 N. J. Law 448.

the agent had the requisite authority to act in the manner in which he acted. When the authority given to an agent is in writing it is easy to ascertain how far the agent might go. When the authority is not in writing there are various means open to the third party to inquire as to the extent of the agent's authority, and under these circumstances he deals with the agent at his peril.[97]

The agent should act in all cases so as to give his principal the benefit of his acts and not to seek any personal benefit to himself and he should also be careful to perform his duty so as to bind his principal and not himself personally. The agent, it may be added, generally speaking, is never held personally responsible where he represents himself as agent of a known principal and acts on behalf of the principal within the scope of his authority. The agent may not always escape liability for the negligent performance of his duty. Where there is a complete execution of the power conferred upon him but he goes farther and does something which is improper, the execution will be good, and the excess acts only will be void. If, however, there is not a complete execution of the power the act will not be binding upon the principal; as where an agent was given authority in writing to sell the lands of his principal subject to a lease, and he agreed to sell free and clear, there was not a complete execution of the power conferred and the agreement was not binding upon the principal.[98]

[97] Mullen v. Quinlan & Co., 195 N. Y. 109, LEADING ILLUSTRATIVE CASES.
[98] Thomas v. Joslin, 30 Minn. 388.

76. **Same subject—Instrument under seal.**—When an agent is to perform an act by an instrument under seal his authority should be conferred by an instrument under seal. The instrument which he makes under seal as an agent must be executed by him in the principal's name. An agent signing his own name to a sealed contract is personally liable and the principal cannot be held liable by the third party, even though the third party knew the signer was an agent; the agent is liable and bound to perform irrespective of whether or not the contract could be enforced against his principal.[99]

77. **Same subject—Simple contracts.**—In oral contracts, as distinguished from written contracts, it is always a question of fact as to who are the actual contracting parties. Even though one is an agent, still he may in fact make himself the other party to a contract with a third person. Where, however, the contract is written, but is not sealed and is not negotiable, like a note, then if the agent signs his own name to the contract so as to appear by the writing to be the other contracting party he will be personally bound, even though he intended to bind only his principal. This is because parol evidence is not admissible to vary a written contract and thus relieve a person from liability who appears by the writing to be liable. But even though the written contract appears on its face to be the agent's personal contract, still since the agent is in legal theory the same as his principal parol evidence is admissible to enable the principal

[99] Briggs v. Partridge, 64 N. Y. 357, LEADING ILLUSTRATIVE CASES.

to take advantage of the contract or, in case the third party so elects, to hold him liable on the contract.

Where a contract not under seal is made by an agent in his own name for an undisclosed principal, whether he describes himself as agent or not, either the agent or principal may sue upon it. Parol evidence is admissible under a simple contract to charge an unknown principal, but not to discharge the actual signer.[2]

78. **Same subject—Negotiable instruments.**—The rules with regard to the execution of negotiable paper by an agent, while embodying some of the principles already referred to, have their own peculiar application. It is of the utmost importance that checks, promissory notes, drafts, bills of exchange, and other negotiable instruments should clearly and definitely show upon their face who are the parties thereto. In order therefore that the principal may be bound it is necessary that the paper shall show upon its face who the principal is, and that his signature thereto is his signature, although made by the hand of his agent. It is not sufficient that the principal be named on the face of the paper; it must also appear that the promise is his, and that the agent signs for him. If the signature is not properly made the agent cannot escape personal liability simply by adding the word "agent." The principal must be named and the signature must be the principal's. With regard to the signing of notes by officers of cor-

1 Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.
2 Ludwig v. Gillespie, 105 N. Y. 653.

porations the general rule is that the corporate name should be signed thereto and following this the name of the official and a designation of his office. Where, however, the note is subscribed by the name of an officer of the corporation, to which name he affixes the title of his office, the result is not always the same.[3] While in some jurisdictions it is held that the note would be a note of the individual officer, it is nevertheless now considered to be the general rule that the signing in the form mentioned presents an ambiguity arising out of the manner of coupling the names of the natural person and the corporation, and it has been held to be open to the parties to introduce extrinsic testimony to disclose the intention of the parties.[4]

[3] Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.
[4] Reeve v. First National Bank, 54 N. J. Law 208.

CHAPTER V.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

79. **Obligation of principal to agent.**—The obligations primarily resting upon a principal toward his agent are to pay him his commissions, salary or compensation, and to indemnify him against loss sustained in the performance of his duties. He is also, like other employers, obliged to protect the agent from injury in prosecuting his employment. The agent may bring action against the principal for his compensation, and he may sue to recover damages for injuries sustained by reason of the principal's negligence. The law further protects the agent in securing his compensation by allowing him a lien on the property or money of his principal when in his possession.[5]

80. **Same subject—Payment of compensation.**—What the compensation of the agent may be depends upon the contract made between the parties. An express agreement as to compensation is not necessary. Where services have been rendered by an agent at the request of the principal the law will imply a promise on the part of the principal to pay the reasonable value thereof. But the services must have been rendered under such circumstances that the duty and intention to pay for them may be fairly

[5] Muller v. Pondir, 55 N. Y. 325.

inferred.[6] When the agreement as to compensation is express it is conclusive. The ratification by the principal of an unauthorized act likewise gives the agent the right to compensation.[7]

The amount of compensation. Where the parties have agreed upon the amount of compensation the agreement will be followed.[8] Where no amount has been agreed upon, the law, as stated above, will imply a promise to pay a reasonable sum for the services rendered, and in determining the reasonable value of services, the opinions of witnesses familiar with the matter will be duly considered. Agents who work upon a contingent basis are entitled to compensation only in the event of success. Should the agent's authority be revoked the agent may nevertheless be entitled to recover compensation or damages depending upon the nature of the employment and whether the principal has rightfully or wrongfully terminated the agency.

81. **Same subject—Agent's reimbursement and indemnity.**—An agent is entitled to be reimbursed for all proper outlays made and expenses incurred by him in the course of his employment for the benefit of the principal. It follows that this right to reimbursement does not extend to expenses incurred through his own fault or negligence.

The agent is entitled to be indemnified by the principal against the consequences of all lawful acts performed by the agent in the course, and within the

[6] Seals v. Edmondson, 73 Ala. 295; Sussdorff v. Schmidt, 55 N. Y. 319, LEADING ILLUSTRATIVE CASES.

[7] Wilson v. Dame, 58 N. H. 392.

[8] Wallace v. Floyd, 29 Pa. St. 184.

scope, of his agency.[9] The loss sustained by the agent must be assumed by the principal. This is so whether the principal has agreed to thus indemnify his agent or not. The law casts the duty upon the principal as a necessary consequence of the relationship. But if the act of the agent is beyond the scope of the authority conferred, or is done in an unlawful undertaking, he, of course, is not entitled to be indemnified.

82. **Same subject—Agent acting for different principals.**—It has already been pointed out that an agent cannot represent both sides, that is to say, he cannot act for his principal, and at the same time act for the third party in the same transaction. Such action on his part is inconsistent with his whole duty toward his principal. He cannot, therefore, recover from both parties, and indeed he cannot recover from either party.[10]

Where the agent, however, acts merely as a middleman, or introduces the parties who afterwards, without the aid or suggestion or advice of the agent, consummate the transaction, he will be entitled to recover his compensation.[11]

83. **Obligations and duties of the agent to the principal.**—The relationship of principal and agent is a fiduciary one, and confidence and trust are reposed in the agent, which require upon his part the utmost good faith in the performance of his duties. He must be loyal to his trust and free from all secret

[9] Moore v. Appleton, 26 Ala. 633.

[10] Rice v. Wood, 113 Mass. 133.

[11] Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, LEADING ILLUSTRATIVE CASES.

and antagonistic interests which might prejudice the rights of his principal. The law will not permit the agent to place himself in a position where he might be tempted by his own private interests to disregard those of his principal. Every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of principal and agent is an illustration. From the agreement which underlies this fiduciary relationship the law both implies a contract and imposes a duty that the agent shall be faithful to his trust and that he shall not use his position so as to defeat or hinder his principal in accomplishing any of the purposes for which the agency was created. A confidential manager of a large business who has acquired valuable information about certain trade secrets will be prevented by injunction from going with a rival concern and divulging to them the trade secrets of his former principal.[12]

84. **Same subject—Loyalty to his trust.**—From the foregoing it is apparent that when confidence is reposed in an agent by his principal the latter is justified in expecting the best efforts of his agent's skill, judgment, and discretion. The motive actuating the principal is confidence in the agent. He has a right to expect loyalty from the agent; but not only has he the right to expect this loyalty but the law justifies him in the expectation and severely condemns the agent for any action on his part wherein he endeavors to profit personally to the detriment of

[12] McCall Company v. Wright, 198 N. Y. 143.

his principal.[13] It is not a crime for an agent to be disloyal to his trust, but by his disloyalty he forfeits his right to compensation for services rendered, and in fact any right which he may have been otherwise entitled to under his contract.

85. **Same subject—Agent cannot deal with himself.**—An agent given authority to purchase property for his principal cannot purchase it from himself; and likewise where he is given authority to sell he cannot sell to himself. He is absolutely prohibited from putting himself in his principal's place to the latter's disadvantage and his own personal gain. An agent cannot avail himself of the benefit of any favorable settlement made by or through him on behalf of his principal. He cannot purchase in his own name a claim against his principal in order to enforce it against his principal. An agent is absolutely prohibited from taking any bonus or secret commission from the third party, in order to induce business relations between the principal and the third party. An agent is, in a sense, a trustee and he will be held to account to his principal for any gain or profit made by him in connection with his principal's property or business, and all profits made by him will be held to belong to the principal. In an important case recently decided, it has been held that where an agent, employed to sell goods for his principal, engages for his own profit in selling a similar line of goods, he will not be permitted to retain the profits of his unfaithful acts and the prin-

[13] The People v. Township Board, 11 Mich. 222, LEADING ILLUSTRATIVE CASES.

cipal will be entitled to recover them without proving damage to himself by loss of profits or otherwise.[14]

86. **Same subject—Obedience to instructions.**—To say that an agent must obey instructions is equivalent to saying that he must faithfully discharge the obligations cast upon him by the principal and honestly act within the scope of the authority conferred. Where an agent is entrusted with an undertaking which requires the exercise of his personal judgment and skill, he is obliged to proceed in the matter wholly with an eye towards the advantage and benefit of his principal. The agent's good faith is sometimes an element to be considered, but where positive and specific instructions are given him, his good faith does not warrant a departure therefrom. The agent renders himself liable to his principal for a disobedience of instructions. Not only may the principal hold him liable for any damages caused by failure to carry out the authority conferred but he is also justified in terminating the agency. By wilful disobedience of instructions the agent forfeits his right to compensation and indemnity. If he exceeds or violates or neglects the instructions given he is responsible for all losses which are the natural consequences of his acts.[15]

87. **Same subject—Ambiguous instructions.**—Where the instructions are ambiguous and they are open to more than one interpretation the agent will be justified in adopting such course as the facts reasonably warrant. In the case of a sudden emergency

[14] Reis & Co. v. Volck, 151 App. Div. 613 (N. Y.).

[15] Whitney v. Merchants Union Express Co., 104 Mass. 152.

where an agent has no opportunity to confer with the principal, a departure from his instructions may be justified when there is no fault or negligence imputable to the agent. The agent will not be justified in acting contrary to instructions simply because he disagrees with the principal as to their interpretation and the manner of carrying them out. Even though he is honest in his intentions, if he exceeds or violates clear instructions, he is responsible for all losses occasioned by his conduct.[16]

88. **Same subject—Effect of custom and usage.**—It is often necessary, in order that an agent may carry out his authority, to follow well-known customs and usages, even though the principal has not directly sanctioned such mode of procedure. These customs and usages, however, cannot supersede positive instructions.[17] In the latter event, the agent has been directly cautioned against such usages and customs. Nor can usage and custom be resorted to when they would be contrary to known rules of law. An agent authorized to sell for cash, cannot justify his act in accepting a check or a promissory note in payment, by showing or attempting to show this form of payment to be usual and customary. An agent authorized to accept checks or notes is not necessarily authorized to endorse them. No custom or usage in itself would justify this.

89. **Same subject—Duty to exercise care.**—It is apparent that an agent owes it to his principal not to be negligent in the performance of his duty. What

[16] Leroy v. Beard, 8 How. 451 (U. S.).
[17] Wanless v. McCandless, 38 Iowa 20.

is negligence in any case is usually a question of fact. It is the failure under the particular circumstances of the case to exercise such degree of care as an ordinarily prudent man would exercise. The agent impliedly warrants when he accepts the appointment that he possesses a competent degree of skill for the duty.

He does not warrant that he will make no mistakes or errors or that he will perform the duty in exactly the same manner as the principal might perform it, but he does undertake, in accepting the employment, to show a reasonable degree of care, skill and diligence in the particular circumstances in which he is authorized to act. There are many instances which might be pointed out as to the application of the rule of negligence, but the general rule will apply to all cases, namely: that "whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith or dishonesty he will be liable to his employer; but if he is guilty of none of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them."[18]

90. **Same subject—To account for money and property.**—The agent is obliged to keep accurate accounts of his transactions and he must stand ready to account to his principal when called upon, or as

[18] Page v. Wells, 37 Mich. 415.

the contract of employment requires, for all money and property which come into his possession belonging to the principal. It is a well-known rule in the law of agency and will bear repetition, that an agent cannot under any circumstances profit personally through the use of his principal's money and property. The agent will not be justified in mixing his own funds with his principal's. He never becomes entitled to his principal's money and holds it practically as a trustee. He must give notice to his principal of the collection of moneys, unless he has already received instructions as to the disposition thereof, or unless by a mode of dealing between the principal and the agent this rule has been modified.[19] He cannot under any circumstances dispute his principal's title to property which comes into his hands, and he is obliged to resort to all proper means and methods to assert and defend his principal's title to such property against third persons. If an agent has in the prosecution of an illegal enterprise for his principal received money or other property belonging to his principal, he is bound to turn it over to him and cannot shield himself from liability upon the ground of the illegality of the original transaction.[20]

91. **Same subject—Duty to give notice to principal.**—An agent must give his principal timely notice of all facts coming to his knowledge, which it is essential that the principal should know, in order to protect or safeguard his interests. He must

[19] Baldwin Bros. v. Potter, 46 Vt. 402.
[20] Kiewert v. Rindskopf, 46 Wis. 481.

acquaint his principal with every fact which may make it necessary for the principal to take measures for his security. He cannot neglect his agency because it has become troublesome. The honest performance of his duty requires that he protect his principal till he has resigned or given his principal an opportunity to substitute another agent. His failure to give notice to his principal in material matters involving the principal's rights and property will subject him to liability, and will amount to a forfeiture of compensation.[21]

[21] Devall v. Burbridge, 4 W. & S. 305 (Pa.).

CHAPTER VI.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND THIRD PARTY.

92. **Disclosed principal.**—When an agent deals with third parties in the name of a particular principal the latter is called a disclosed principal, as distinguished from one whose name and identity are unknown at the time of the transaction, in which case the principal is said to be an undisclosed principal.

Once it is ascertained that the relationship of principal and agent exists, the question arises what is the responsibility as between the principal and the third party with whom the agent deals, with regard to the agent's contracts; in other words, what is the legal effect of the execution of the agency as between the principal and the third party. It is more ordinarily the case that an agent acts on behalf of a disclosed principal rather than on behalf of an undisclosed principal, for it is generally in the interest of the agent to make known the person on whose behalf he is acting.[22]

93. **Contracts made by the agent.**—The primary object of agency is to bring the principal into contractual relations with third parties. It is important, therefore, to inquire, what contracts of the agent are binding upon the principal. We have al-

[22] Byington v. Simpson, 134 Mass. 169, LEADING ILLUSTRATIVE CASES.

ready spoken of the agent's acting within the "scope of his authority" and we have ascertained that the meaning of this phrase is the proper and reasonable extent of the power expressly or impliedly conferred. When therefore the agent acts within the scope of his authority, whether the actual authority or the ostensible or apparent authority, his contracts with third parties are binding on the principal. When the agent acts beyond the scope of his actual authority, but within the scope of his apparent or ostensible authority, his contracts are also binding upon the principal unless the third party has notice that the agent exceeded the authority conferred.[23]

94. **Contracts actually authorized.**—There is little difficulty in placing responsibility upon the principal or upon the third party, as the case may be, for the contracts of the agent when such contracts have been actually authorized. The principal will of course be bound in the same manner as if he personally made the contract. The third party will be likewise bound because he dealt with the agent under his actual and defined authority.

95. **Ostensible authority of the agent.**—The doctrine of ostensible authority has been defined as follows: "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the

[23] Huntley v. Mathias, 90 N. C. 101; Pickert v. Marston, 68 Wis. 465.

principal is estopped as against such innocent third person from denying the agent's authority to perform it."[24]

The ostensible or apparent authority may therefore arise from the known customs and usages of a business or of a locality or from the manner in which the principal has held out the agent. As distinguished from actual authority, ostensible authority springs from inference, and when the inference is reasonable under the particular circumstances and the parties act in good faith, the agent's contracts are binding.

96. **Contracts unauthorized.**—The third party is bound to ascertain the extent of the agent's authority. If the agent has neither actual nor apparent authority there is, as a matter of fact, no principal to be bound; and the principal upon whose behalf the agent attempts to act is under no circumstances held responsible. In the first place the alleged principal never authorized the contract and secondly he did not estop himself from denying the agency by holding out the agent as his for any purpose. It is elementary therefore to say that the principal is not responsible for contracts which he has neither directly nor indirectly authorized; just as it is equally elementary to say that he is responsible for contracts which he has duly and properly authorized his agent to make.

97. **Contracts of agent on behalf of undisclosed principal—The general rule.**—It has already been

[24] Johnston v. Milwaukee & W. Investment Co., 46 Neb. 480; Huntington v. Knox, 7 Cush. 371 (Mass.), LEADING ILLUSTRATIVE CASES.

pointed out that when an agent makes a contract in his own name and ostensibly for his own benefit but is in reality acting for the benefit of a principal, the latter is said to be an undisclosed principal. An act done by an agent in his own name without disclosing his principal renders the agent personally liable, but his acts having been in fact done for a principal, the latter, when discovered, may, at the option of the party with whom the agent has dealt, be held liable. This is true in all simple contracts made on the principal's behalf by the agent.[25] The law, as it were, operates upon the acts and intention of the parties and establishes a privity between the principal and the third party, and, further, implies the promise and obligation on which the action is founded. It accords a remedy to the party who is chiefly interested.

So when the agent acts for an undisclosed principal he is acting for the benefit and advantage of that principal, and the law, in a roundabout way perhaps, but nevertheless surely, places responsibility on the principal to the advantage of the third party, or holds the latter to the advantage of the principal, as the circumstances require.

98. **Suits against an undisclosed principal.**—A suit against an undisclosed principal rests upon the ground that the principal has had the benefit of the contract and ought to bear the burden. It is in a sense a quasi-contractual obligation created by law. Where a party deals with a principal through an agent, and the principal has the benefit of the deal-

[25] Kayton v. Barnett, 116 N. Y. 625, LEADING ILLUSTRATIVE CASES.

ing, it is said that the minds of the parties have met through the agent's mind, and that, if the principal through his own or his agent's deception acquires certain rights and property, he cannot resist liability. It is to be observed that the agent does not in all these cases relieve himself of responsibility. In fact, it is a general rule that the third party who deals with an agent personally, even though the latter acts for an undisclosed principal, may hold the agent personally responsible.[26] The third party usually has his election to hold either principal or agent responsible, but it is plain that he cannot hold both of them.

In suits against an undisclosed principal certain defenses are open to the latter, the first of which may be stated to be the state of accounts between the principal and the agent. When one sells goods to another, supposing him to be a principal, but afterwards learns that he is an agent, he may nevertheless hold the principal, subject to the qualification that the state of the account between the principal and the agent be not altered to the prejudice of the principal. The principal is said to be discharged where he has in good faith paid the agent or made such change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller. Delay upon the part of the third person may often prejudice the principal and work an estoppel. The principal is discharged from liability to the third person where the latter has by his conduct led the principal to believe

[26] Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.

that there has been a settlement between the third person and the agent.[27]

Another defense which may be urged by the undisclosed principal is that the third party has unequivocally elected to hold the agent. The third party's election is a question of fact. Where the third party learns who the principal is but nevertheless proceeds against the agent, he is precluded from afterward bringing action against the principal.

A further defense open to the undisclosed principal is the fact that the contract between the agent and the third party was under seal and, under such circumstances, the common law rule would apply that only the parties named in a sealed instrument can sue or be sued upon it.[28]

Where the contract is a negotiable instrument, only the party whose name appears on the paper can be sued upon it. If there is ambiguity upon the face of the paper as to whether the principal or the agent is intended to be bound, evidence is admissible to show the real situation.

99. **Suits by an undisclosed principal.**—The undisclosed principal may sue the third party even although the latter never intended to undertake an obligation in favor of the principal. Where, however, by the express or implied terms of the contract there is a plain indication that the third party intended to contract only with the agent as the ostensible principal, the real principal cannot maintain an action upon the contract. Furthermore, as indi-

[27] Heald v. Kenworthy, 10 Ex. 739 (Eng.); Fradley v. Hyland, 37 Fed. Rep. 49 (U. S.); Knapp v. Simon, 96 N. Y. 284.

[28] Briggs v. Partridge, 64 N. Y. 357, Leading Illustrative Cases.

cated above, where the contract made by the agent in his own name with the third party is under seal the principal cannot become a party thereto or maintain an action thereon. And where the contract is a negotiable instrument it is the rule that only the parties thereto may sue or be sued thereon.

A principal may maintain an action upon a contract not under seal made by his agent with a third person, although the agency was not disclosed when the contract was made. If the agent has authority to make a written contract not under seal and makes it in his own name, the principal, whether known or unknown, is liable and he in turn is entitled to the benefit of the contract and may sue thereon.

Thus, where a creditor took a chattel mortgage on goods of his debtor in reliance upon a statement as to their value made by a professional appraiser, which valuation was grossly excessive, he could maintain an action against the appraiser to recover the loss caused by such negligence although the appraiser was employed by the plaintiff's attorneys who did not disclose their principal.

It seems, that although an undisclosed principal may as a general rule enforce a contract made by his agent in his own name, there is an exception where personal trust or confidence is reposed by the third party in the agent who contracted in his own name.[29]

The state of accounts between the agent and the third party at the time the principal seeks to assert his rights against the third party is also a matter of

[29] See the recent case of Navarre Hotel and Importation Company v. American Appraisal Company, 156 App. Div. 795 (N. Y.).

defense. The principal cannot assert his rights without leaving to the third party the same rights as if the agent had been in fact the principal. Where the agent sells goods in his own name, having possession of the goods, the right of set-off which might be asserted against the agent may be asserted against the undisclosed principal. Where the agent has not possession of the goods the right of set-off cannot in general be asserted by the third party. The doctrine of the state of accounts between the third party and the agent is practically the doctrine of estoppel. When the principal by his conduct leads third parties to believe that the agent is the principal, the real principal is estopped from asserting against the third party any claims to the latter's prejudice; if the principal invests his agent with the indicia of ownership of property he is estopped, as against those who deal with the agent as owner, to set up his own claim or title. And in general, where the principal, by representing the agent to be the principal, has induced innocent third parties to change their legal relations in such manner as to make it unequitable for the principal to claim the right of an undisclosed principal, he will be estopped from maintaining an action in his own name.

100. **Parol evidence rule.**—It is a well settled rule that parol evidence is admissible to show that a written contract, made in the name of an agent, was made on behalf of an undisclosed principal. "Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even

where the writing gives no indication of an intent to bind any other person than the signer, we cannot re-open it, for it is as well settled as any part of the law of agency."[30]

101. **Same subject.**—The rule that parol evidence is admissible to charge the real principal under a contract wherein he is not named, does not apply of course where the instrument is signed and sealed by the agent or where it is a negotiable instrument. While parol evidence is admissible under simple contracts to charge the real principal it is not admissible to discharge the agent, for it is said that to permit this would be to allow parol evidence to contradict a written instrument and this is opposed to a sound rule of evidence. Furthermore, parol evidence is not admissible to contradict the express terms of a written contract. The concise statement of the rule would be to say that parol evidence is admissible under a simple contract to charge the unnamed principal but not to discharge the actual signer. The parol evidence rule is equally operative in favor of the principal not named in the contract to show that he is not the real principal; and where the third party looks to hold the actual signer parol evidence is not admissible to release him from the obligation which he has voluntarily assumed. It is a rule, therefore, which operates for the benefit of the principal and the third party when they seek to take advantage of it, but is not operative to release the agent who has dealt in his individual capacity.[31]

[30] Byington v. Simpson, 134 Mass. 169, LEADING ILLUSTRATIVE CASES.
[31] Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.

102. **When notice to agent is notice to principal.**—It is well established in the law of agency that notice received by an agent in the course of his employment, and in connection with the exercise of his authority, is notice to the principal.[32] Whether or not the agent communicates to his principal all the material facts of which he has acquired knowledge in the discharge of the agency, the same are, nevertheless, binding upon the principal. The principal entrusts his agent with the performance of the duty and the third party has a right to assume that the agent will faithfully discharge his obligation and that the agent will report to his principal any facts and circumstances connected with the accomplishment of the agency.

Another statement of the rule in question is to say that if notice of a particular fact comes to the agent while he is concerned for the principal and in the course of the very transaction, or so soon before it that the agent must be presumed to recollect it, it is notice to the principal. Where an agency is in its nature continuous and made up of a long series of transactions of the same general character, the knowledge acquired by the agent in one or more of the transactions is to be charged as knowledge of the principal.[33]

Where the agent acquires notice outside of the transaction the principal is only chargeable upon clear proof that the knowledge which the agent had and which he might have obtained at another time

[32] Constant v. University of Rochester, 111 N. Y. 604.
[33] Holden v. N. Y. & Erie Bank, 72 N. Y. 286.

and in another transaction, was present to his mind at the very time of the transaction in question.

103. **Notice to sub-agent.**—The question of the liability of the principal for knowledge or notice brought home to the sub-agent depends very largely upon whether or not the sub-agent was appointed with due authority. If the agent had power to appoint the sub-agent, then notice to the sub-agent is usually held binding upon the principal. Where an agent is authorized to make a collection and he turns the matter over to a sub-agent, it is a general rule that the principal would not be chargeable with notice to the sub-agent, for the reason that under the circumstances there was no express or implied authority in the agent to employ a sub-agent. If, however, the business transaction confided to the agent reasonably contemplates the appointment of a sub-agent, it is said that notice to the sub-agent will then be binding upon the principal because of the implied authority to hire or employ a sub-agent. Furthermore, the usages and customs of trade will sometimes govern in the solution of the question.[34]

104. **Liability of principal to third persons for the agent's tort.**—It is well known that a master is responsible for the torts of his servant, when the latter commits the tort in the performance of his duty. The same rule also applies in the relationship of principal and agent. When the agent in the performance of his duty and within the scope of his authority commits a tort he renders his principal

[34] Hoover v. Wise, 91 U. S. 308; Bates v. American Mortgage Co., 37 S. C. 88.

liable therefor.[35] The agent's torts usually arise out of misrepresentations or frauds, and while it may be frequently the fact that the principal did not authorize his agent to make representations or commit frauds, nevertheless the test of the principal's responsibility is whether or not the agent acted within the ostensible authority conferred, in order to induce the third party to act.[36] It is sometimes said that the liability of the principal for his agent's torts is founded upon the doctrine of estoppel. An agent may have real or apparent authority to make representations, but the same cannot be said about his committing torts; and the principal is estopped from denying his responsibility for his agent's torts when committed within the exercise of his real or ostensible authority.

[35] State v. Smith, 78 Me. 260.

[36] Noblesville & E. Gravel Road Co. v. Gause, 76 Ind. 142; Passenger R. R. Co. v. Young, 21 Ohio St. 518; Higgins v. Watervliet, etc., Co., 46 N. Y. 23.

CHAPTER VII.

LEGAL EFFECT OF THE RELATION AS BETWEEN AGENT AND THIRD PARTY.

105. **The duties and liabilities of the agent to third persons.**—The manner in which the agent acts toward third parties, and third parties toward the agent, gives rise to certain rights and obligations on the one side and on the other, which form an essential part of the law of agency. Neither the third party nor the agent seek to create obligations as between themselves (for the agent is merely a representative), but through neglect, fraud, or ignorance these obligations may be created. These mutual rights or obligations may arise out of contract or they may arise out of tort. It is the general rule that third persons cannot recover damages from an agent for the neglect or non-performance of a duty which the agent owes only to the principal.[37] How, then, is the agent liable to third persons? His liability to third persons arises either from the fact that he has so contracted as to bind himself or because he has failed to exercise a proper regard for the rights and privileges of others while in the prosecution of his agency. In the latter case he is held responsible, notwithstanding the act is one authorized by the principal, since the law, in protecting the rights of the public, demands that he

[37] Henshaw v. Noble, 7 Ohio St. 226.

who does the act shall be equally responsible with him who authorizes it. In the former case the agent's liability arises from contract, in the latter from his torts or wrongful acts.[38]

106. **Same subject—In contract.**—It may be pointed out first of all that when the agent acts within the scope of his authority and discloses his principal, the latter is alone bound by the agent's contract. When, however, the agent, knowingly or mistakenly, acts outside the scope of his authority, and represents that he has the requisite authority, he is liable to the third party for the damages sustained by the latter in reliance on the agent's representations.[39] In the first instance above referred to the contract was authorized, and in the second instance it was unauthorized.

In the case of the unauthorized contract it is true the agent may not be held on the contract, for there was in fact no contract.[40] He may be held in damages for the breach of his warranty of authority, for he impliedly warrants his authority when he makes a contract for his principal. But when the agent specifically states that he does not warrant his authority, or where he acts in good faith and the third party has knowledge of the facts upon which the agent's belief is founded, there is no liability on the part of the agent. Neither would an action lie against the agent if the contract which he made

[38] See generally, Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.

[39] Kroeger v. Pitcairn, 101 Pa. St. 311, Leading Illustrative Cases.

[40] Ballou v. Talbot, 16 Mass. 461; McCurdy v. Rogers, 21 Wis. 197; Hall v. Crandall, 20 Cal. 568.

was invalid and he was unable to enforce it against the principal.

When the agent makes a contract in his own name and on his own behalf he may, of course, be sued upon the contract as his own.[41] But when he makes an unauthorized contract on behalf of his principal the suit against him is on the breach of his warranty of authority, and the damages that may be recovered are those which might have been recovered against the principal in case the contract had been authorized and the principal had refused to perform it. In the event that the contract is found to be unenforcible against the principal by reason of some defect other than the want of authority in the agent, no damages based upon the breach of his warranty of authority can be recovered against the agent.

The warranty of authority means not only that the agent has the requisite authority to make the contract, but, further, that his principal was competent to give such authority when it was given and has not since, to the knowledge of the agent, become incompetent.[42]

An agent may so deal as to bind himself personally even though he discloses who his principal is. It resolves itself into a question of the intention and understanding of the parties. Where, for example, a seller knows the principal but debits the agent, he is presumed to have consented to look to the agent; and where the principal is known, but

[41] Meyer v. Redmond, 141 App. Div. 123 (N. Y.), LEADING ILLUSTRATIVE CASES.

[42] Drew v. Nunn, L. R. 4 Q. B. D. 661 (Eng.); Hoppe v. Saylor, 53 Mo. App. 4.

the third party accepts the personal obligation of the agent, it is likewise presumed that credit is given to the agent and not to the principal. If the ostensible agent is really the principal and is, in fact, acting on his own behalf, he is, of course, liable upon the contract. Further, when the agent makes a contract under seal in his own name, he alone is bound thereby, for under the common law it is held that only the parties to a sealed contract can be charged thereunder.[43]

With regard to negotiable instruments the general rule prevails that only the person in whose name the instrument is executed is liable upon it and that parol evidence is inadmissible to prove that one who executes a negotiable instrument in his own name did so in behalf of an undisclosed principal, or of a principal disclosed but unnamed in the instrument.

A general rule running through the doctrine of undisclosed principal in the law of agency is that when the agent contracts in his own name for an undisclosed principal both the agent and the principal are liable, and the third party may elect which he will hold. Once the third party has elected to hold the principal, the agent is released and vice versa. A principal is not said to be undisclosed, however, simply because he is not named; if the third party knows the agent is acting for a principal and there is no specific contract binding the agent personally, the sole remedy will be against the principal.

[43] Briggs v. Partridge, 64 N. Y. 357, Leading Illustrative Cases.

It may then be summarily stated, first, that where an agent contracts in his own name and on his own behalf he is personally liable; second, where an agent acts for a principal but without due authorization he is liable in damages on contract for a breach of his implied warranty of authority (or, as is pointed out in the next section, in tort for his wilful deceit); third, where an agent makes an authorized contract for an undisclosed principal the principal and the agent are liable on the contract and under some circumstances the agent by his manner of acting may make himself solely liable, and in general the third party has his right of election to proceed against either the principal or the agent.

107. **Same subject—In tort.**—If the agent wilfully misrepresents his authority he is liable to the injured party in an action of deceit. This action in tort is based upon his wilful or reckless conduct. It is distinguished from the action against the agent on contract for the breach of his warranty of authority. To maintain the deceit action the third party must be actually deceived and all the other elements of the tort action in deceit must be present. An agent is not liable to third persons for the neglect or nonfeasance of those duties which he owes only to his principal, as they are owing to the principal and none but he can complain. Under this rule it is held that an agent is not liable to others who are damaged by his neglect to keep his principal's building in repair, or to keep open a drain of the principal. But for misfeasance, by which is meant wrongdoing or active negligence in

the performance of his duties, the agent is liable to those who are injured thereby. "But an agent, like any other person, is bound in the performance of his duty to his principal to recognize and respect the rights and privileges of others, and if he fails to do so, either negligently or intentionally, and thereby causes injury to a stranger, he is liable to the stranger for the damages sustained, and the fact that the injury occurred while in the performance of his agency will constitute no defense. In certain of such cases the principal will be liable also, but that fact does not relieve the agent."[44]

"No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence in respect to duties imposed by law upon him in common with all other men."[45]

108. **Same subject—Public agents.**—The rules fixing the liability of agents to third persons, which have just been presented, are applicable to private agents, as distinguished from public agents or officers. Public officers or agents owe their duty primarily to the public, and it is the general rule that they do not become liable to individuals for neglect or violation of their public duties. But in case they owe a duty to a particular individual which duty is ministerial in nature, and does not involve judgment or discretion in its exercise, they do be-

[44] Mechem, Agency, § 571.

[45] Delaney v. Rochereau & Co., 34 La. Ann. 1123, LEADING ILLUSTRATIVE CASES.

come liable to the individual for any damage or injury sustained by him.[46]

109. **Duties and liabilities of third persons to the agent.**—As a rule the contracts made by an agent, as such, on behalf of his principal and in which he has no beneficial interest cannot be sued upon by the agent. The principal alone can sue upon them. But where the contract is made with the agent personally, whether intentionally or as a result of defective execution of the authority, whereby the agent binds himself instead of his principal, it is the agent's own contract and he may sue upon it. In such contracts the agent has bound himself to the other party, and in order that the contracts be valid the other party must be held bound to the agent. "An agent may sue in his own name: First, when the contract is in writing and is expressly made with him, although he may have been known to act as agent. Secondly, when the agent is the only known or ostensible principal and is, therefore, in contemplation of law, the real contracting party. Thirdly, when, by the usage of trade, he is authorized to act as owner or as a principal contracting party notwithstanding his well-known position as agent only. But this right of an agent to bring an action in certain cases in his own name is subordinate to the rights of the principal who may, unless in particular cases where the agent has a lien or some other vested right, bring suit himself and thus suspend or extinguish the right of the agent."[47]

[46] Moss v. Cummins, 44 Mich. 359.

[47] Rowe v. Rand, 111 Ind. 206.

Where the agent has a beneficial interest in the execution of the contract, as for advances, commission, and the like, or a lien upon, or a special property in, the subject matter of the contract, he may also sue upon it in his own name.

Although the contract is in the name of the agent and the principal undisclosed, yet the principal on whose behalf it is made may sue upon it and thus preclude the agent, unless the contract made with the agent is under seal, or he has a beneficial interest, lien, or other vested right in the matter.[48]

Whether an agent, who has acted as such, in dealing with a third person can show himself to be the real principal depends upon whether the contract is executed or executory and whether in making it he has or has not named the principal. Thus, if he contracted for a named principal and the contract is executory, or yet to be performed, he cannot, without the consent of the other party, place himself in the position of the principal for whose credit or skill the party contracted. But if the contract has been executed by such agent with the express or implied consent of the other party, he may compel performance from the other party to himself; otherwise, however, if the agent has performed as principal without the knowledge or consent of the other party. When the contract by the agent is made for an unnamed principal, whether it is executed or executory, the agent may show himself to be the real principal, as the other party cannot be said to have relied upon the credit or ability of

[48] Schaefer v. Henkel, 75 N. Y. 378.

a principal whom he does not know, and the agent will answer for such unknown principal as well as another.

In all cases where the agent sues in his own name on contracts made in behalf of the principal, the defendant may avail himself of all defenses which would be good at law and in equity: 1. As against the agent who is plaintiff on the record, or, 2. As against the principal for whose use the action is brought, if such a principal exists. If the action of the agent is not superseded by that of the principal, he is entitled to recover the same measure of damage as the principal himself could recover.

For the wrongful or tortious acts of third persons which affect him personally in the course of his employment, the agent may sue in his own name, though in such cases the principal is entitled to an action for the loss of service or for damage.

Ordinarily the agent's possession of his principal's goods alone does not give him the right to sue in his own name one who would disturb his possession. Otherwise, however, if the agent has a claim on the goods or a property right in them. As against a trespasser the agent with a special interest in his principal's goods may recover the full value of the goods taken, but as against his principal, or those claiming under him, he can only recover the amount of his interest.[49]

[49] Mechem, Agency, §§ 764, 765, citing Faulkner v. Brown, 13 Wend. 63 (N. Y.); Beyer & Co. v. Bush & Son, 50 Ala. 19; Little v. Fossett, 34 Me. 545; Burk v. Webb, 32 Mich. 173.

CHAPTER VIII.

SPECIAL CLASSES OF AGENTS.

110. **Purpose of chapter.**—Certain classes of agents are of such general importance as to demand separate attention at the hands of text-writers; these are, Attorneys-at-Law, Auctioneers, Brokers, and Factors. In the present chapter the special rules applicable to these particular agencies will be discussed.

111. **Attorneys-at-law—Nature of the relation of attorney and client.**—The relation which arises from the employment of an attorney-at-law to conduct a case or transact business for one is that of principal and agent, and the general rules applicable to agency apply to the parties to the contract. The employment of the attorney, or his authority, may be formal, but is more frequently informal, and may arise from the words or conduct of the client, or be the result of a subsequent ratification of unauthorized acts. The authority of a duly admitted attorney who appears in a cause is presumed in the first instance, but the presumption is not conclusive and may be questioned by the client or the opposite party. The presumption has its origin in the fact that the attorney is an officer of the court, and as such is considered to be acting in accordance with his duty.[50] Hence, in an action on a foreign or

[50] Schlitz v. Meyer, 61 Wis. 418.

domestic judgment, the defendant may show that he was not served with process and the appearance by attorney was unauthorized.[51]

112. **Scope of the attorney's authority.**—An attorney-at-law is defined to be "an officer of a court of justice who is qualified to conduct the cause of a litigant therein."[52] He is an officer of the court and is quite generally required to have certain qualifications as a prerequisite to practicing his profession. Thus, in most states he is required by statute to pass an examination upon the various branches of law and show himself qualified by attaining a certain average grade therein. Other qualifications are full age, good moral character, citizenship in the state, and, in some instances, it is held that only male persons can qualify as attorneys.[53]

It has been recently held in an important case in the state of New York[54] that corporations cannot practice law, and the language of Mr. Justice Vann, who wrote the unanimous opinion of the court, is so significant that the following quotation from the opinion will not be out of place:

"The relation of attorney and client is that of master and servant in a limited and dignified sense and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot

[51] Gilman v. Gilman, 126 Mass. 26; Mastin v. Gray, 19 Kan. 458; Pennywit v. Foote, 27 Ohio St. 600; Reynolds v. Fleming, 30 Kan. 106.

[52] Mechem, Agency, § 802, citing Weeks, Attorneys, § 28.

[53] In a majority of the states women are now eligible to become attorneys-at-law. Matter of Hall, 50 Conn. 131; Matter of Goodell, 48 Wis. 693.

[54] Matter of Co-Operative Law Company, 198 N. Y. 479.

exist between an attorney employed by a corporation to practice law for it and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted, it may be, wholly by laymen, organized simply to make money and not to aid in the administration of justice, which is the highest function of an attorney and counsellor-at-law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning, or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest members became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

"A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it. (People v. Woodbury Dermatological Institute, 192 N. Y. 454; Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 246.)"

Being officers of court and amenable thereto, attorneys-at-law, in relation to the conduct and management of their client's suits, have a wide range of implied authority, and so long as their acts are in good faith, and are not fraudulent or collusive, they bind the client, though they may be prejudicial to his interests.[55]

The express authority given an attorney may be as broad or limited as the client desires, but a general authority to manage a cause for the client as his attorney of record may imply many incidental powers, and these have been classified by Professor Mechem in his valuable work as follows:

"To make such affidavits as are required in the progress of the cause when the facts are within his knowledge. To waive a verification. To serve, and accept service of, all necessary and proper papers, notices, etc., during the progress of the cause. To waive formal notice of proceedings in the cause. To waive or extend the time fixed for any motion or proceeding. To consent to a reference of the cause. To submit the cause to arbitrators. To dismiss or discontinue the action. To consent to a nonsuit. To appeal the case. To admit facts for the purpose of trial, either on the trial or before. To stipulate as to the issues to be tried. To waive informalities and technicalities. To release an attachment lien before judgment. To stipulate that judgment in the cause be the same as in another cause then pending involving the same questions. To get necessary briefs printed at client's expense. To bring a new action after a nonsuit. To agree that upon judgment being entered for his client he will suspend

[55] Beck v. Bellamy, 93 N. C. 129; Moulton v. Bowker, 114 Mass. 36.

the issue of execution. To remit damages after a verdict."[56]

The same author has also summarized the authorities as to what an attorney-at-law, employed to manage a suit, has not implied power to do; thus, such an attorney has no implied power:

"To admit or accept service of original process, by which the court acquires original jurisdiction for the first time of the person of his client. To confess or consent to judgment against his client. To enter a retraxit when it is a final bar. To stipulate that the dismissal of an action shall bar an action for malicious prosecution. To compromise the claim of his client. To release his client's cause of action. To stipulate not to appeal or move for a new trial. To release the property of the defendant from the lien of a judgment, or from the levy of an execution. To release his client's security without payment. To discharge or release a surety or endorser. To discharge a defendant in custody on a ca. sa., without the plaintiff's consent or without satisfaction. To agree to suspend proceedings on a judgment. To release a garnishee from the attachment of money or property in his hands. To release the interest of parties so as to make them competent as witnesses. To give an extension of time on the demand. To assign or transfer the demand or suit to a third person. To consent to stay the execution if lien will be lost. To waive the right to an inquisition. To give up the demand and take other security. To employ counsel at client's expense. To stipulate that case shall not be tried during certain periods. To undertake journeys on client's behalf and at his expense."[57]

[56] Mechem, Agency, § 812.

[57] Mechem, Agency, § 813.

An attorney-at-law may employ subordinates as clerks, stenographers, etc., to assist in the employment, but has no authority to delegate his duty to others, as the relation is pre-eminently one of trust and confidence.

Whether an attorney has implied authority to execute bonds in the name of his client depends upon the circumstances. If such bonds are required to be under seal, he must have similar authority. But where a seal is not required and the bond is necessary to protect the client's interests and fulfill the purpose of the employment, the attorney may sign a bond in the name of the principal, but he is under no obligation to do so.[58]

The attorney has authority to receive payment of a claim given him to collect, but he cannot receive part in satisfaction of the whole, or grant extensions or indulgences. Payment to the attorney will discharge the debtor, but if the payment is made on account of a written security the debtor must see that the attorney holds the security.[59] The authority extends to receiving or enforcing payment after judgment, and payment to the attorney of record will satisfy judgment. But the payment, to release the judgment, must be in money and for the full amount.[60]

113. **The duties and liabilities of attorneys.**—The relation between the attorney and his client is one of trust and confidence, and frequently involves affairs of the greatest importance and delicacy, so

[58] Mechem, Agency, § 816.
[59] Smith v. Kidd, 68 N. Y. 130.
[60] Herriman v. Shomon, 24 Kan. 387.

that the rules applicable to persons standing in fiduciary relations apply with added force to this relation.

Towards his client the attorney must observe the duty to keep from accepting or representing adverse interests calculated to affect his loyalty to his principal. So it is his duty, and one which he warrants that he will perform by accepting the employment —to exercise reasonable care and skill in the management of the trust confided to him. He is not held to the highest degree of skill or ability, and is not to be presumed infallible, or bound to know all the law. And if he possesses the average degree of skill and learning in his profession current in that part of the country in which he practices, and exercises such learning and skill with reasonable care and diligence, he will not be liable for mistakes made in the course of the employment.[61]

For negligence in respect to his duty to exercise reasonable skill and care he is liable in damages to his client. And for negligence or palpable ignorance in regard to the well-known and well-settled principles of law which affect the client's rights, as in respect to the bringing of a suit, the conduct of the trial, examination of titles, preparation of contracts, and the like, the attorney becomes liable to his client for the injury done, the measure of damage being the actual loss sustained as the natural, direct, and proximate result of his negligence or ignorance.[62]

[61] Mechem, Agency, §§ 824, 825.

[62] Pennington's Ex'rs v. Yell, 11 Ark. 212; Stevens v. Walker, 55 Ill. 151.

Towards third persons the attorney cannot become liable for the neglect of any duty he owes to his client. But he may not collude with his client to perpetrate a fraud upon a third person, and for such wrongdoing he is liable. He is held liable as other agents where he contracts in his own name.[63] Thus, he is held liable for the fees of court officers for serving and filing writs and papers in an action. For his torts or wrongs towards third persons in his individual capacity he is liable, but for acts done in pursuance of his profession at the instance of the client, in good faith and without malice, he is not personally responsible, and this is true though the client has acted with malice or without probable cause.[64] The attorney is liable if of his own malice, though apparently acting for the client, he begins or carries on a malicious prosecution. So, if the attorney, knowing that his client was acting maliciously and without probable cause, assists him in the issuing and service of process, he will be liable personally as well as the client.

114. **Liability of the client to the attorney.**—The attorney, as other agents, is entitled to reimbursement for costs, charges, and expenses which he has incurred in his client's behalf, and to indemnification against the results of acts done for the client within the scope of his authority. He is entitled to compensation and may sue for same.[65] The compensation may be agreed upon and then the special con-

[63] Savings Bank v. Ward, 100 U. S. 195.
[64] Burnap v. March, 13 Ill. 535; Peck v. Chouteau, 91 Mo. 138.
[65] Stanton v. Embry, 93 U. S. 548.

tract governs; but in the absence of express contract the attorney is entitled to compensation measured according to the reasonable value of the services performed. And the question of what is a reasonable value is determined from a consideration of "the nature of the controversy and the questions involved; the amount at issue; the skill and labor required; the responsibility imposed; the standing, experience, learning, reputation, tact, assiduity, and integrity of the attorney; and the success achieved."[66]

It is the right of the client to discharge the attorney at any time, and this though there has been a general retainer for which the attorney is bound to conduct the case from its beginning to its termination.[67] The client may, by a special agreement, bind himself to employ and pay the attorney for a definite period or for a certain case. In the absence of such agreement the dismissal of the attorney is no grounds for damages from the client. But it is held that the attorney cannot be discharged without cause until he is paid his fees and charges.[68]

115. **The attorney's lien.**—The compensation of an attorney is a matter of contract between himself and his client. The law protects the attorney by giving him a lien upon his client's papers and property in his possession. The lien is of two kinds, general and special. The general lien is the right to retain the papers and property of the client entrusted to him until the payment of his bill. The

[66] Mechem, Agency, § 849.
[67] Tenney v. Berger, 93 N. Y. 524.
[68] Ogden v. Devlin, 45 N. Y. Supr. 631.

special lien attaches to the judgment or the money recovered in an action and, generally by statute, to the client's cause of action. Under the general lien the attorney may refuse to surrender papers or property of his client without full payment for services rendered. Under the special lien the attorney has a claim upon the moneys in his possession obtained through his efforts for his client. The general lien is sometimes referred to as the passive or retaining lien, and the special lien is sometimes referred to as the active lien.

The relationship of attorney and client must, of course, exist in order that the attorney may avail himself of the benefits of the lien, and the attorney may elect to waive his lien voluntarily or there may be circumstances under which, by his conduct and action, his right to a lien may be forfeited.[69]

116. **Privileged communications.**—One of the well-settled rules of law is that which makes confidential, and prevents from being disclosed, secret communications which are made necessary in certain cases between a person and his adviser. The law, seeking to protect the confidence which the client reposes in the attorney, does not compel the latter to disclose these matters, and further prevents him from voluntarily disclosing them without his client's permission. This subject of privileged communications pertains rather to the law of evidence than to the subject now in hand, and the student is referred to the subject of Evidence treated in Volume 14 of Modern American Law.

[69] For further treatment of this point see subject, LIENS AND PLEDGES.

117. **Auctioneers.**—As a rule, in the absence of statutes prescribing requirements, any person competent to act as an agent may be employed as an auctioneer. Regulations in some cases are prescribed by statute, and they may also be subject to local municipal ordinances. The auctioneer is the agent of the person employing him to sell, up to the moment he accepts a bid and declares the sale consummated. He then becomes the agent of the purchaser to complete the transfer and sale of the property and may bind him by making and signing memorandums of the transaction. In making the terms he acts for both parties with their implied assent. But his authority to bind the purchaser is limited and must be exercised at the time of accepting the bid and at the place of sale.[70] His authority may be by parol or in writing, and need not be in writing even to sell realty, unless expressly required by the statutes. The authority to sell goods at auction may be implied, but does not arise from a mere authority to sell. The auctioneer has implied power to arrange the conditions and terms of sale upon such reasonable and ordinary rules as usually govern, but these may be prescribed by the owner and then must be followed, and the buyer who has notice of them cannot acquire title contrary to their provisions.[71] Further, the auctioneer has implied power to accept the highest bid and declare the sale consummated; to receive payment, in cash at the time of sale, of the purchase price, unless known to

[70] Horton v. McCarty, 53 Me. 394.
[71] Farr v. John, 23 Iowa 286.

be restricted in this respect; and in the case of personal property to sue for the price or the recovery of the goods, if the terms of the sale are not lived up to by the purchaser.[72]

The auctioneer has no authority to delegate his employment; to sell on credit; to revoke the sale when completed; to sell at private sale; to bid himself, directly or indirectly, or to warrant quality, unless such is the usual custom.

118. **Duties and liabilities of auctioneers.**—As other agents, the auctioneer must use such skill and diligence as the employment which he holds himself out as competent to conduct requires, but he will not be responsible for mistakes or errors of judgment in the absence of apparent negligence. He should obey and follow the reasonable instructions of the principal, look after the safety of goods entrusted to him, account for proceeds, attend to his duties in person, and disclose the fact of his agency and the name of his principal.[73]

For failure to disclose his principal he makes himself personally liable to the persons with whom he deals.[74] And by exceeding his authority to represent and bind the principal he makes himself personally responsible, as by warranty of his principal's title. He is held to be responsible to the true owner for selling goods given to him to sell by one having no title, as a thief. But he is not liable for

[72] Broughton v. Silloway, 114 Mass. 71.

[73] Hicks v. Minturn, 19 Wend. 550 (N. Y.); Steele v. Ellmaker, 11 Serg. & Rawle 86 (Pa.); Schoenfeld v. Fleisher, 73 Ill. 404.

[74] Meyer v. Redmond, 141 App. Div. 123 (N. Y.), LEADING ILLUSTRATIVE CASES.

failing to sell property as advertised, though parties have been put to expense and trouble in order to attend the sale.

119. **Rights of auctioneers.**—As to his principal, the auctioneer is entitled to be indemnified for all authoritative acts within the scope of the employment, and to be compensated for his services as agreed or at the statutory rate, and for costs and expenses. He is given a lien on the goods of the principal or on the proceeds of the sale for his charges and compensation.

The auctioneer, as against a wrongdoer, is regarded as having a special property in the goods entrusted to him, and may recover for any injury done them, but he cannot dispute the title of his principal to the goods.

120. **Brokers.**—The occupation of a broker is to bring parties together for the purpose of bargaining, or to make bargains for them in various commercial matters. Brokers may be divided, according to the class of transactions in which they deal, into money brokers, stock brokers, ship brokers, bill brokers, insurance brokers, real estate brokers, and merchandise brokers.

A bill and note broker negotiates the sale and exchange of promissory notes and bills of exchange. An exchange broker negotiates the transfer of foreign or domestic bills of exchange. An insurance broker negotiates deals between parties seeking insurance and the insurance company, usually representing the insured and not the company. A merchandise broker negotiates sales of merchandise be-

tween parties, but does not take possession or control of the property sold, as do factors.

Bouvier defines a stock broker as one "employed to buy and sell shares of stock in incorporated companies and the indebtedness of government." In buying and selling stocks and securities he is a mere agent of the principal, but stock brokers are now customarily employed not only to act as agents for the principal, but upon his authority to buy stocks on their own credit or with their own funds, as a matter of speculation, for which they charge a stated commission. This is the method followed by stock exchange brokers.[75]

121. **Appointment and implied powers of brokers.** —In the absence of statute no special mode of appointing or authorizing a broker is necessary, and the authority may be given by parol or in writing, or may be implied from acts and conduct of the parties.[76] The implied powers of the broker duly authorized are not extensive; as he is not possessed of the goods or property, his duties are rather to assist the parties to act for themselves than to represent them. The usages which have grown up in the particular transactions which he makes, assist in determining and fixing the limits of his implied powers. These commercial usages are enforced by the courts when reasonable. The principal is supposed to give the authority with reference to well-known usages of the business, but usage will not suffice to authorize a broker to act contrary to ex-

[75] Mechem, Agency, § 936. See Markham v. Jaudon, 41 N. Y. 235.
[76] Howe Machine Co. v. Clark, 15 Kan. 492.

press instructions. All reasonable and necessary powers to conclude the transaction for which he was engaged are implied.

He has no authority to delegate his employment; or to act for any but the party employing him, except with the knowledge and consent of both parties whom he seeks to represent; or to go outside of his instructions, except in cases of emergency. He should act only in the name of the principal, and as a rule has no implied power to act in his own name.[77] If employed to buy or sell property and not instructed as to price, he has implied authority to pay or receive in good faith the usual market price. He has no authority to receive payment unless expressly conferred, but, having the right to arrange the terms of sale, he may give reasonable credit, unless usage forbids.

122. **Duties and liabilities of a broker.** — The broker is held to the ordinary skill and diligence which is exercised by others in the line of his employment, and for a failure to exercise such reasonable and usual discretion and diligence he will be liable to his principal for the loss suffered by him. He is required, as are all agents, to be loyal to his principal, and this forbids his buying from or selling to himself without the knowledge and consent of the principal. He cannot, for the same reason, act for both parties without the full knowledge and warrant of each.[78]

By concealing his agency and the name of his

[77] Saladin v. Mitchell, 45 Ill. 79.

[78] Alexander v. Northwestern Christian University, 57 Ind. 466.

principal he makes himself liable upon the contract. So he may expressly charge himself by buying on his own credit, but in order that he may do so when the principal is known, the facts must be clear. He becomes personally liable when he assumes to act for a principal and lacks the requisite authority to bind the principal.

123. **The broker's rights.**—From the principal the broker is entitled to compensation, and this is usually a commission or percentage on the value of the undertaking or employment. This rate of commission may be established by a custom or usage when not expressly fixed. To be entitled to compensation, the broker must prove his employment, and further that it has been performed according to the terms. The principal's right to sell real estate himself continues after the employment of a broker for the same purpose, unless he has expressly waived the right; and for a sale by the principal the broker can claim no commission unless the sale was the result of his own efforts.[79] But the principal cannot cut off the broker's right to compensation by revoking his authority before the time set for its termination, and for so doing he is liable to the agent in damages. The principal may employ two or more brokers unless he has given one an exclusive authority to sell.

For all costs and expenses assumed by the broker, and for all losses and liabilities incurred in good faith in the line of his authority, the principal must indemnify him. In case the undertaking is entire

[79] Hungerford v. Hicks, 39 Conn. 259; Keys v. Johnson, 68 Pa. St. 42.

and is not completed by the broker, his right to reimbursement and indemnity depends upon the same principles which govern his right to compensation. If his employment did not contemplate payment unless the sale was consummated, he cannot, in the absence of special agreement, recover for expenses incurred.

The broker has no general lien, not having possession of property, but in certain cases he has a particular lien. Thus, an insurance broker may have possession of the insurance policies negotiated by him, and he has a retaining lien for his costs and charges in securing them.[80]

As against third persons the broker has no special property to protect and is only called upon to sue personally in case he has contracted in his own name, or is the real principal, or has a special interest in the subject matter of the contract.

124. **Appointment and implied powers of factors.**—Factors are persons employed to sell goods upon commission. Their appointment may be by parol, in writing, or inferred from conduct. No formal grant of authority is necessary. Their powers may be expressly limited, and unless limited they include, by implication, not only those necessary and usual to complete the purpose of the employment, but also those customary powers established by well-known commercial usages.[81]

A factor has implied power to sell on credit unless limited in this regard by special instructions or

[80] Barry v. Boninger, 46 Md. 59.

[81] Owings v. Hull, 9 Peters 607 (U. S.).

usage, but must exercise a reasonable discretion as to whom to trust; also to sell in his own name, to warrant quality, and to receive payment. He may pledge the goods in his possession for charges or duties levied upon them, but cannot pledge them for his own personal debt.[82] Where the factor pledges without authority, as for his own debt, the pledgees take no title as against the owner, unless, as is the case in several states, the statutes, or Factors' Acts, protect those who have dealt in good faith with the factor, believing that he was the owner of the goods entrusted to him.

125. **Duties and liabilities of factors.**—Factors also must exercise that degree of skill, diligence and prudence which is current in the employment they profess to follow. They are bound to be faithful and loyal to their principal, and to keep themselves from assuming adverse interests or from representing the other party to the transaction. It is their duty to obey reasonable instructions from the principal, and to safeguard his interests. They should inform the principal of facts coming to their knowledge in relation to their agency and material to the principal's interests. For failure to perform these duties they are liable to the principal for the loss suffered by him.

126. **Rights of factors.**—The factor is entitled to compensation from the principal, usually a commission fixed by agreement, by usage, or upon a *quantum meruit*.[83] For all advances and expenses in-

[82] Wright v. Solomon, 19 Cal. 64.
[83] Zurn v. Noedel, 113 Pa. St. 336.

curred on the principal's behalf within the performance of the undertaking, the factor is entitled to be reimbursed by the principal. For all acts within the limits of his authority and all liabilities incurred in the discharge of his duties he is to be held harmless by the principal. He is given a general lien upon all goods of the principal of which he has the possession, and upon the money or security realized from their authorized sale, to secure the payment of all amounts due him by the principal in reference to the particular goods, or any general balance due under the contract of agency. But the lien does not extend to protect a debt contracted prior to, and without reference to the agency.[84]

As against third persons, the factor can sue for the purchase price of the goods, or upon a note taken in payment from the purchaser. He also may sue upon the contract if made in his own name, and maintain an action for trespass, trover, or replevin against those who injure the goods or seek to take them without authority.[85]

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[84] Jordan, Ellis & Co. v. James, 5 Ohio 88.
[85] Beyer & Co. v. Bush & Son, 50 Ala. 19.

QUIZ QUESTIONS
AGENCY

(The numbers refer to the numbered sections in the text.)

1. What may be said in regard to agency as a separate branch of law?
2. Define agent.
3. Define principal.
4. Wherein does agency differ from service?
5. Give the various classifications of agents. Define general agent; special agent.
6. Name some agencies which are usually given separate consideration.
7. Give the general rule in regard to the purposes for which agents may be appointed.
8. Discuss the rule that an illegal or immoral act cannot be delegated. What classes of acts are forbidden to be delegated as against public policy? Are lobbying agents able to enforce their contracts with the principal?
9. How, in general, is the relationship of principal and agent established? Is it necessary that the contract of agency be in writing?
10. State briefly the necessary elements of the contract of agency.
11. What consideration should exist between the parties for the contract of agency? State briefly what is meant by consideration in the contract.
12. Give the general rule as to who may be principals.
13. What is the rule in respect to infants as principals?

14-18. What is the rule as to principals in respect to insane persons? Married women? Corporations? Partnerships? Clubs?

19. What is the rule as to who may become agents?

20. What are the legal principles governing the appointment of infants as agents? Married women? Corporations? Partnerships?
21. What is meant by joint principals? Give examples. What are the principles governing the liability of members of unincorporated societies and clubs?
22. What are the rules governing the execution of the authority by joint agents? What exception to the rules?
23. Can an agent act for two opposing principals? If so, state under what circumstances.
24. What is meant by agency by estoppel? Give an illustration.
25-26. What is the meaning of agency from necessity? Give the more common instances in which agency from necessity operates.
27. What is meant by the formation of the relation of principal and agent by ratification?
28. State in a concise manner the meaning of ratification.
29-31. State the necessary elements of ratification and give illustrations of the application of the doctrine of ratification.
32. What form should the ratification by the principal take? When is it necessary that ratification should be in writing? When is it necessary that ratification should be by instrument under seal?
33. State generally what acts may be ratified.
34. Has the validity of the act anything to do with the manner or form of ratification thereof? Can forgery be the subject of ratification?
35. What is the general doctrine as to who may ratify the act of an alleged agent? Can a partner ratify the act of his co-partner? Can an agent ratify the act of a sub-agent?
36. What is the effect of the ratification by the principal of the contract made by the agent?
37. Does the ratification of a contract made by the agent bring the principal into privity with the third party? What is the doctrine as to whether the third party may withdraw before the principal ratifies?
38. Can the principal by ratifying the act of an alleged agent interfere with the previously acquired rights of strangers?

39. After the ratification is the agent wholly released from responsibility to the principal?
40. What is the effect of ratification as between the agent and the third party?
41. May an agent delegate his authority? What is meant by delegation of authority? If possible give the Latin maxim.
42. Are there any circumstances under which an agent may delegate authority involving judgment and discretion?
43. What may be said as to the delegation of mechanical and ministerial duties?
44. Give the definition of a sub-agent. Has an agent authority to employ a sub-agent? If so, state under what circumstances.
45. What are in general the methods of terminating the relation between the agent and the principal?

46-47. What is meant by the termination of the relation of principal and agent by original agreement? What is meant by termination by subsequent agreement?

48. How may a principal revoke the authority of his agent, and what agencies are revocable at will?
49. Distinguish between the principal's right to revoke and his power to revoke, and give examples.
50. Is the element of good faith on the part of the principal in revoking an agency ever a factor in determining the rights of the agent?
51. State what is meant by "power coupled with an interest" and give an illustration.
52. After the revocation of an agency by a principal, what notice, if any, is required to be given by him? Does the principal's liability for the acts of the agent continue where he fails to give notice?
53. What is the result of a renunciation of his appointment by the agent?
54. State the manner in which an agency may be terminated by operation of law.
55. What effect has the death of the principal or of the agent upon the agency?

56-58. What effect has the insanity of either principal or agent upon the agency? What effect has the bankruptcy of

either? What effect has the outbreak of war on the relationship?

59. Has the marriage of either party any effect upon the relationship of principal and agent?

60. What is meant by express authority given to an agent and what may be said as to the extent to which an agent may go in exercising it?

61. How may implied authority in an agent arise? Give an example.

62. (a) What is meant by general authority and what by special authority of an agent? (b) May general authority and special authority arise by implication?

63. (a) Is there any distinction between the authority given to an agent and instructions given to him? (b) A is a diamond merchant, and B is a jeweler. B is accustomed to receive goods from A for sale to his customers. A places in B's hands a diamond ring, and it is agreed that B may offer it for sale and that he is to pay for it when it is sold. B sells the ring to C, but B absconds with the money. A sues C to recover the purchase price. Can he recover?

64. (a) To what extent are third parties protected in dealing with a general agent? (b) To what extent are they protected in dealing with a special agent?

65. (a) What is the general rule of the construction of a written power of attorney? (b) Write out a power of attorney to John Jones, authorizing him to manage your coal business while you are in Europe, and put in such provisions as you would consider necessary for the proper management of the business during your absence.

66. What construction is placed upon the authority when the same is given to an agent by word of mouth?

67. When the authority given to an agent is doubtful or ambiguous, to what extent will the third party be protected in dealing with the agent?

68. When the authority of an agent arises by implication, what is the rule of construction of such implied authority?

69-70. (a) How is an agent given authority to sell land? (b) A authorizes B to sell his house and lot, but does this by word of mouth. How far may B go in the transaction?

(c) If B conveyed title to C under the oral authority, would C have legal title against the owner?

71. A, in driving through the town of Chatham, stops at the Phenix Hotel over night and leaves his horse and wagon in the stable of B. The next morning before A calls at the stable B represents to C that he owns the horse and wagon and sells it to C. B receives the purchase price. A, learning that C has possession of the horse, attempts to take it away from him, but C resists. What are the rights of the parties?

72. Where an agent is given authority to purchase property, can he sell his own property to the principal?

73. What is the general rule as to whether an agent may make or endorse negotiable paper on behalf of his principal?

74. To what extent may an agent act who is given authority to manage the business of his principal?

75. (a) How must an agent execute the authority conferred on him? (b) Can agency be proved by the statements and declarations of the agent? (c) Where both the principal and the agent deny the agency, how may the third party prove the same?

76. (a) How should an agent who is to perform an act under seal execute his authority? (b) Assume that the agent has signed an instrument under seal with his own name, and that the third party knew he was signing simply as an agent for a particular principal. Can the principal sue the third party on the sealed instrument?

77. (a) A signs a contract not under seal in his own name. Later the third party learns that A acted merely as agent, whereas he had relied upon the personal responsibility of A at the time the contract was made. The third party sues the principal. Can he recover? (b) In the event that the third party sues the agent, can the agent relieve himself from responsibility by showing that he acted for a principal?

78. May an agent's authority to make and endorse negotiable instruments arise by implication? If so, give an illustration.

79-80. (a) What are the chief duties of the principal toward the agent? (b) Where no amount of compensation has

been agreed upon for the agent, how is it usually to be determined?

81. Is the principal obliged to reimburse and indemnify the agent? If so, to what extent and under what conditions?

82. (a) Can an agent who acts for two different principals in a transaction recover from both or either? (b) State under what circumstances, if at all, he might recover from both principals.

83-84. What are the principal duties of the agent toward his principal?

85. (a) May an agent deal with himself to his own personal gain in transacting business of his principal? (b) A was employed as agent to sell wearing apparel on the road and to give his exclusive time to his principal's business. He engaged, however, in a similar line of business in his own behalf and made considerable profit. The principal, learning of the facts, brought action against the agent to recover all the profits the agent had made, and succeeded. Was the judgment correct?

86. What may be said as to the rule which requires an agent to obey the instructions of his principal?

87. Assuming that the principal's instructions are ambiguous, how should the agent act?

88. Can custom or usage vary the instructions given to an agent?

89. Assuming that an agent is careless in the performance of his duties, does he forfeit his right to compensation?

90. What is the general rule as to the obligation of an agent to account for money and property of his principal?

91. To what extent is an agent obliged to give notice to his principal of transactions in which the principal is interested?

92. What is meant by a disclosed principal?

93-94. When the principal is disclosed at the time of the transaction, is the agent responsible to the third party?

95-96. Is the principal ever responsible to a third party where the agent acts beyond his actual authority?

97-98. (a) What is meant by an undisclosed principal? (b) What is the general rule as to the responsibility of an undisclosed principal to a third party?

99. Under what circumstances may an undisclosed principal bring suit against the third party?

100-101. (a) In the event that an alleged undisclosed principal is sued on a contract made by a supposed agent, is it competent for the principal to show that he was not the real principal? (b) State in substance the parol evidence rule, first in connection with the principal's liability, and secondly, in connection with the agent's liability.

102-103. Under what circumstances is notice to the agent notice to the principal?

104. Is the principal liable to third parties for the agent's torts? State the rule.

105-106. State in a general way the duties and liabilities of an agent to third persons, and give a concrete illustration as to the manner in which an agent may personally bind himself to third persons in contract.

107-108. To what extent and under what circumstances is an agent responsible to third parties for his torts?

109. May an agent in his own name sue a third party in contract? Give a concrete illustration.

110-111. State in a few words the relationship existing between attorney and client.

112. (a) What is the scope of the attorney's authority? Name some of the things which an attorney may do in managing a cause for his client. (b) Name some of the acts which an attorney may not perform for his client without express authority.

113. Name some of the obligations and responsibilities of attorney to client.

114. (a) When the relationship is established, what are the obligations of the client to the attorney? (b) How is the attorney's compensation fixed?

115. Has an attorney any claim or lien on his client's papers or property?

116. What is the rule as to whether or not an attorney may divulge communications made to him by his client in the course of his employment?

117. Define in a few words what is meant by an auctioneer and state his general duties.

118. May an auctioneer be held personally liable by the third party with whom he deals on behalf of a principal?

119. What are the rights of the auctioneer as to compensation? State whether or not he has a lien on the goods of the principal.

120. (a) What is meant by a broker? (b) What do you understand by a broker working on a contingency or on a commission? (c) State the rule as to whether a broker's authority may be revoked without notice. Name the different classes of brokers.

121-123. (a) How is a broker appointed, and what, in general, are his duties and liabilities? (b) What are his rights as to compensation, reimbursement, indemnity, etc? (c) Has a broker a lien on his principal's goods?

124. What is meant by a factor?

125. State in a few words the factor's duties and liabilities.

126. (a) What are a factor's rights? (b) Has he a lien on the goods of his principal?

PART II

SALES OF PERSONAL PROPERTY

BY

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CHAPTER I.

GENERAL NATURE OF SUBJECT.

1. **The Uniform Sales Act.**—Frequent reference is made throughout this article to the Sales Act. This is an Act which has been drawn up by Commissioners on Uniform State Laws who have been appointed by the various states for the purpose of bringing about uniformity in the laws of the different states relating to commercial subjects. This act has already been adopted in Alaska, Arizona, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi (with modifications), Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and Wyoming.

The act states the law of sales as it has been developed in this country, being for the most part a codification of the existing legal principles which are generally considered sound, rather than an attempt to change established doctrines, except in the few

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instances where commercial usage is at variance with legal decisions. On most points it sets forth, very concisely and accurately, the principles of the law of sales.

2. **Definition and scope of subject.**—The definition given in the Sales Act[1] is: "A sale of goods is an agreement whereby the seller transfers the property right in goods to the buyer for a consideration called the price."

The law of sales deals only with questions concerned with the transference of property in chattels, and though real estate transfers are often spoken of as sales, such transactions should more properly be spoken of as conveyances and the term "sale" used with reference to the transfer of title to personal property.

The subject of sales is closely connected with the subject of contracts, since contract is concerned in every case of sale, the actual sale being the result of the contract to sell, which is often spoken of as an executory sale. But it is only as such a contract is actually carried out so that it accomplishes the transference of property from one party to the other that it can properly be called a sale as distinguished from a contract to sell.

The vital point to be considered in sales is the transfer of the property right in a thing from one person to another. This right of ownership or property right in the thing is called "title," and it is entirely with the question of the transfer of title to personal property that the law of sales deals.

[1] § 1 (2).

Title is defined as "that which is the foundation of ownership of property";[2] "the channel through which an owner has acquired his right; the collection of facts from which, by the operation of law, his right arises."[3] Thus when it is said that "risk attends title," it is meant that the one who has the title to goods is ordinarily the owner thereof in such a way that any loss caused by the injury or destruction of the goods will fall upon him. They are his property, and it will be his loss.

3. **Sale distinguished from other transactions.**— A sale is to be distinguished from barter, gift, bailment, pledge, and chattel mortgage.

Barter. A barter is an exchange of goods for other goods, while a sale is an exchange of goods for money. Though a distinction is usually drawn between the two transactions no real difference in principle exists. In one case the consideration is other goods, and in the other case money, but this difference is not material and the two transactions are in all ways governed by the same rules.

Gift. A gift differs from a sale in that no consideration is given for the transfer of title, and in order to perfect a gift, delivery, either of the chattel itself or something which represents it, is absolutely essential, while title may pass in the case of sale without delivery.

Bailment. While the vital thing in a sale is the passing of title to the chattel, in bailment there is no parting with title at all, but merely a giving up of

[2] Hunt v. Eaton, 55 Mich. 362.
[3] Century Dictionary.

possession. There may be a sale, i. e., a passing of title, without the possession being transferred if the parties so intend, while in bailment there is never a passing of title but always the giving up of possession and possession only.

Pledge. A pledge is a bailment made for the purpose of security for a debt, and there is no change in the property right in the thing pledged contemplated by the parties, other than as this may later become necessary in order to realize upon the security if the debt or other obligation for which the pledge has been given is not satisfied.

Chattel mortgage. A chattel mortgage is given only as security and here also the purpose is not to change the property right in the thing mortgaged unless the obligation for which the security is given is not paid. The chattel mortgage is usually stated to consist of the passing of the title to personalty for the purpose of security only, subject to the provision that the title shall revest in the one giving the mortgage upon his satisfying the terms on which it was given. The security in this case is not, however, as in the case of the pledge, dependent upon possession. The whole purpose of the transaction is the giving of security, while the whole purpose in the case of a sale is the complete and absolute change of the rights and ownership in the thing.

CHAPTER II.

SUBJECT MATTER OF SALES.

4. **Property must be in existence.**—Since the law of sales deals with the transfer of title to property one must be able to point out the particular property about which the parties are dealing before he can talk about the transfer of title. Title can be spoken of only with reference to specific property, and cannot be thought of apart from it any more than one can think of a shadow apart from and unrelated to the substance which casts it.

A man can only transfer title to something which he has. Until he has it, he has no title to transfer and the most that he can do is to contract that when he does get it he will sell it. But that is merely a contract to sell and not a sale,[4] and, if the thing which the parties are dealing about has ceased to exist, there can be no sale since the seller now has no property and no title to pass. Suppose that A intends to sell his horse to B and B intends to buy it, but, unknown to both of the parties, the horse which was to be the subject matter of the sale has died. There is no sale for the simple reason that A had no horse at the time of the intended sale and therefore has no title which he can pass. A does not own a horse, but merely owns a carcass. But B does not purport to be buy-

[4] Sales Act, § 5 (3). "Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods."

ing a carcass and therefore there is no sale. There is no longer any horse and consequently no title to a horse which may be transferred.[5]

5. **Potential property.**—There is a class of cases which at first sight would seem to be in conflict with the rule that property must be in existence before there can be an actual sale thereof. This is where the property, though not now actually existent in its final form, may come into existence in the future through the course of nature. Thus, if one owns certain sheep, the wool which will be grown upon those sheep in the coming year may be said to have such a "potential" existence as to make it the subject of a present sale. The owner of the sheep has potential wool, that is, he now owns that which in the course of nature will develop into wool. He has an actual present right in something and he may sell it.

But what would the buyer get in such a case? Is he purchasing wool? No, that cannot be, for there is as yet no such actual thing as next year's wool *as wool* now in existence. Whatever the buyer gets, he gets now, at the time of the sale. When the wool as actual wool finally comes into existence and is cut from the sheep, the title is in the buyer without any further act on the part of the seller. As wool it never was owned by the seller. All he ever owned was potential wool, that is, wool not having actual existence as such, and this was what he sold. When it actually came into existence, it came into exist-

[5] Sales Act, § 7 (1). "Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void."

ence as the property of the buyer, and even an innocent purchaser from the seller would have gained no property right in it.

6. **Two views of potential property.**—The courts have differed materially as to when a thing has such potential existence as to make it the subject of sale. One line of cases holds that if a man owns that from which property may be produced, he has a potential property in the produce for any definite time in the future. Thus, if one owns land, he may sell the crop of corn which will be produced thereon ten years hence.[6]

The other view, which seems much more reasonable, maintains that a particular crop can be considered to have potential existence only after the seed has been planted and has started to germinate.[7] Or, in the case of animals which are to be born in the future, they are not considered to have potential existence until the period of gestation has commenced. This seems the better view, since, even in this limited form, the doctrine of potential property, of future property as already having such existence as to make it the subject of present sale, seems to be a most extreme idea.

7. **What things may have potential existence.**—As stated above, a man may have potential property only in that which may be produced in the course of nature from that which he already owns. Thus, a man has no potential property in a catch of fish which he expects to make, even though he has a ship

[6] Grantham v. Hawley, Hobart 132 (Eng.), LEADING ILLUSTRATIVE CASES.
[7] Merchants' and Mechanics' Savings Bank v. Lovejoy, 84 Wis. 601, 609.

and nets and all the other appliances necessary for catching fish.[8] He has no property, actual or potential, in any fish until they are actually caught, and hence cannot pass any property right in them until that time. The most that he could possibly do in such a case would be to contract to sell them when he caught them. They would be his when he caught them and he would have to transfer the title later, if he wished to perform his previous contract.

8. **Future-acquired property.**—Since property must have existence either actual or potential, there can be no present sale of things which are to be acquired in the future, or are still to be made. There may be a contract to sell a ship which is to be built, or a horse which is to be purchased from another, but there can be no actual sale until the thing is actually acquired by the seller. He cannot sell it, for he does not have it to sell.

Though all courts admit that there is no sale at law in such a case, yet many courts do give some effect in equity to such a bargain as between the parties themselves if the one promising to sell the after-acquired property is insolvent, and no rights of innocent third parties have intervened. This does not make it a sale, however, but merely compels the performance by the seller of the contract to sell which he had validly made. The buyer in such a case would have no adequate remedy otherwise, since the seller, being insolvent, is not able to pay damages for the breach of the contract.[9]

[8] Low v. Pew, 108 Mass. 347, LEADING ILLUSTRATIVE CASES.
[9] Holroyd v. Marshall, 10 H. L. Cas. 191 (Eng.).

CHAPTER III.

IDENTIFICATION OF THE GOODS.

9. **Goods must be specified.**—Since sales deal with the passing of title, there must in every case be specific property, which can be pointed out, the title to which is to be transferred. This is expressed in the Sales Act[10] as follows: "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." If a person owns ten horses he may sell a one-tenth interest in all his horses, but he cannot sell any one of his ten horses. Title to one horse can pass only when an agreement has been made as to the particular horse which is to be the subject of the contract. He might agree to allow the purchaser to make a choice and take title to any horse in his herd, but this is as yet nothing but a contract to sell and there will be no passing of title under this agreement until the selection has actually been made.[11]

10. **Mutual assent to passing of title.**—Not only must the goods be specified, but, further, the parties must have agreed, the one to pass and the other to take title to the particular thing. Suppose that A, owning ten sacks of sugar, all of the same brand

[10] § 17.

[11] Robinson v. Stricklin, 73 Neb. 242, 102 N. W. 479, LEADING ILLUSTRATIVE CASES.

and quality, offers to sell one sack to B. It cannot reasonably make any difference to B which sack he is given, yet until he has agreed in some way that a particular sack shall be his or has permitted A to select and set aside one for him, there can be no passing of title. No matter how definitely A might appropriate one sack to B, as by setting it aside and marking it with B's name, still he cannot pass title to it unless or until A has assented to such an appropriation being made.[12]

11. **Previous assent.**—However, if the buyer leaves it to the seller to select the goods which are to answer the contract, there may be a passing of title thereto, if the parties so intend, when the seller definitely appropriates to the contract goods of the kind bargained for. There is in such a case a clear agreement upon the goods to which title is to pass, i. e., one gives his assent to take title to whatever goods the other may definitely appropriate to him. This has been stated in the Sales Act[13] as a rule for determining when the parties have intended that title should pass, as follows: "Where there is a contract to sell unascertained goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer." If the title has thus passed, all the consequences of the passing of title must follow. If it is agreed that

[12] Wheelhouse v. Parr, 141 Mass. 593, 6 N. E. 787, LEADING ILLUSTRATIVE CASES.

[13] § 19, rule 4 (1).

title shall pass to whatever goods the seller may select and set aside for the buyer and such selection has been made, then if those goods are afterwards destroyed the loss is upon the buyer; and on the other hand, if after such appropriation the seller should take back the goods which he has set aside for the buyer and replace them with other goods of the same kind and quality, the seller would be guilty of converting the goods of the buyer and the buyer would not be obliged to accept the substituted goods.

12. **Passing of title by delivery to carrier—Buyer paying transportation charges.**—The most usual case of previous assent given by one party to the other to select goods and pass the title to them is where goods are ordered from a distance. Here the buyer merely asks for goods of a certain description and it must be understood that he leaves it to the seller to select the particular goods to which title is to pass. He says in effect, "I agree to accept as the goods which are to be the subject matter of the sale whatever goods you may select of the description ordered." But at what time, by this contract, will the buyer accept the title to the goods? He may, of course, fix any time he pleases as the moment when title is to pass, but in the absence of an express agreement, what is the understanding and intention of the parties? Since the goods are soon to pass out of the actual possession and control of the seller, it has seemed reasonable to fix as the exact moment for the passing of title, the time when the goods are given up by the seller and are no longer under his actual control or that of anyone acting specially for

him, that is, when they are given into the possession of the carrier. This rule, that title will pass when goods are given into the hands of the carrier, though somewhat arbitrary, is not at all unreasonable. We are merely trying to find out when the parties intended the title to pass, and in the absence of any showing of a contrary intent it is fair to presume that this is the moment which the parties had in mind. This presumption as to intention is thus stated in the Sales Act:[14] "Where in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract," with certain exceptions which will be later referred to. Though the carrier is not strictly the agent of either of the parties, but is a public servant acting for anyone who may apply, still when the buyer is paying the freight, it may fairly be said that in carrying the goods, the carrier is acting more for the buyer than for the seller, when the seller has given up his control over them.

13. **Same subject—Seller paying transportation charges.**—Applying the same line of reasoning, when the seller pays the freight, the carrier in acting is more directly representing the seller than the buyer, and it cannot be said that the seller has completely given up his control over the goods. Here, again, in the absence of an expressed intention of the parties, we must adopt some rule, as a presump-

[14] § 19, rule 4 (2).

tion, to guide us in determining what is the intention of the parties. This presumption as expressed in the Sales Act[15] is that, "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

14. **Sale of goods to be separated from a mass.**—Since the minds of the parties must have met as to the particular goods which are to be the subject matter of the sale, there cannot be a passing of title to any particular goods which are mixed with others of the like kind so as to be indistinguishable. Thus, if A has a bin containing one thousand bushels of wheat, he cannot pass title to one hundred bushels thereof until the same has been separated so as to be identified as the exact one hundred bushels, title to which the parties have intended to pass. Until separation the buyer cannot point to any one hundred bushels of grain and say, "That is my wheat." If the parties intend that there shall be ownership given in one hundred bushels as such, then there is nothing but a contract to sell until actual separation is made.[16]

15. **Sale of portion of mass.**—Though the parties cannot make a present sale of one hundred bushels of wheat without separating it from the mass, yet they may make a present sale of a certain interest

[15] § 19, rule 5.

[16] Courtright & Co. v. Leonard et al., 11 Iowa 32, LEADING ILLUSTRATIVE CASES.

in the whole mass and immediately pass title. A may sell to B a one-tenth interest in all the grain in the bin and the parties will at once become tenants in common in the proportion of nine to one in all the wheat. But the mass in which they are to have such ownership must be definitely specified. Under such a bargain no particular part of the mass belongs to one or to the other, but each has a proportionate interest in every particle of wheat in the whole mass.[17] The case is no different from that of parties who each own a half-interest in a cow. One does not own the front half or the hind half, nor do they divide their interests laterally. The only difference is that in one case there may be an understanding that either will have a right to separate his proportion from the rest and change the tenancy in common into individual ownership, while in the other case any such attempt might cause such serious results that it cannot be supposed that such was the intention of the parties, and there can be a separation of interests only by making a sale and dividing the proceeds.

16. **Sale of portion of mass in terms of a definite quantity.**—It is possible that a buyer may wish to buy one hundred bushels of grain, which are now a part of a larger mass, desiring to store the same with the other grain of the seller. Is it possible, then, for him to get a property right in a portion of the mass when he buys in terms of a definite quan-

[17] Sales Act, § 6 (1), provides: "There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares."

tity? Suppose that he has purchased one hundred bushels and has separated the same from the general mass. Clearly the title to that one hundred bushels has passed to him. If he now bargains with the seller to store this one hundred bushels with the other grain of like kind and quality which is in the seller's bin, certainly he will not lose all rights of property by mixing his grain with that of the seller. It is true that he can no longer point to any specific one hundred bushels of grain to which he holds the title. If this is so then what property right does he have? If he now has any property right whatever it must be in the nature of tenancy in common with the owner of the other grain in the entire mass which has resulted from the mixture. What then is his ownership in this resultant mixture? If he knew that the seller had exactly nine hundred bushels, he knows that, by mixing his one hundred bushels with the nine hundred bushels of the seller, his proportion becomes one hundred one-thousandths, or one-tenth, of the whole mass.

But suppose that the quantity belonging to the seller is not exactly known, then, after the buyer's one hundred bushels are added, he knows that, though he cannot name the exact fraction which represents his interest in the whole mass, yet he owns such a proportion of the mass as would yield him one hundred bushels if the parties should now attempt to separate their interests. In other words, the whole quantity, the exact amount of which is unknown, may be represented by x. His proportion will be this fraction, $\frac{100}{x}$. It is a definite amount and

the only difficulty is that it is not known exactly what it is. As in any other question of an unknown quantity, the facts in the case must be arrived at in the best way possible through evidence and the testimony of witnesses. The proportion of the mass to which the various parties are entitled once having been fixed, any loss which may result will fall upon them in this proportion.

17. **Same subject.**—If it is possible for the parties thus to create a tenancy in common and change their entire ownership of the specific grain into a tenancy in common of the resultant mass, may not the parties create such an ownership in bargaining for the purchase and sale of a definite quantity, as one hundred bushels, without going through the form of making an actual separation to be later followed by a mixing together again of the very same grain? It certainly seems possible that this may be done if the parties so intend, and most courts in recent years have so held. Kimberly v. Patchin[18] is the leading case on this question, but it should be carefully noticed that this case merely decided that it is possible, if the parties so intend, that they may become tenants in common of a mass though they have dealt, in making the sale, in terms of a definite quantity.

The next problem to be determined in every case is, did they so intend? Where no special bargain showing their intention has been made by the parties, it may often be arrived at by viewing the custom in the particular line of business, i. e., whether it is customary for parties dealing in goods of this

[18] 19 N. Y. 330, Leading Illustrative Cases.

kind to leave them in a common mass with the right to call for them at any time and to receive a definite quantity. Though it might be difficult to show that such a tenancy in common was intended in the ordinary case unless there was a special agreement with reference thereto, it may be very easy to show that the parties intend to pass a title to a fraction of the whole mass of a like kind and quality if the seller is conducting a warehouse or an elevator for the storage of such goods and it is the custom of business for depositors to leave theirs stored in the mass with similar goods,[19] or where the goods are to be shipped and it is the custom to ship in a common mass.[20] In the case of a private individual buying grain, who does not make it a business to store for others, it may be difficult to show that in dealing in terms of a definite quantity the parties have meant the one to take and the other to sell a present interest in the whole mass to be represented by such a fraction as $\frac{100}{x}$. The result of the decisions is that there may be a present sale of a portion of a mass without separation, even though made in terms of a definite quantity, if such a tenancy in common was contemplated by the parties as shown by their actual intentions either expressed, or implied from the custom of the particular business. This tenancy in common is not a necessary, but merely a possible result of their bargain.

18. **Fungible goods.**—Though it is possible to infer that the parties have meant to become such

[19] Young v. Miles, 20 Wis. 615.
[20] Brownfield v. Johnson, 128 Pa. 254, 18 Atl. 543.

tenants in common, where the goods which are the subject of the contract are fungible, that is, goods which are always sold by weight or measure, so that it can make no difference to the buyer whether he is given one portion of the goods or another, it is much more difficult to infer that they intended such a tenancy in common with reference to goods which are not ordinarily dealt with in this way, such as barrels of pork or of flour, unless the parties have distinctly stated their desire to assume such ownership. No court has applied the rule that it is possible that parties may have intended to assume an ownership of a portion of the mass though dealing in terms of a definite quantity, except in case of goods which are deemed fungible. But the courts have differed very much as to what goods come within this description, though it seems clearly the better view to apply the rule only to such goods as grains, oils, or other goods which are ordinarily stored in mass and which are always dealt with by weight or measure, where one unit is necessarily like every other unit and it can make no difference to the purchaser which particular unit is finally separated and assigned to him as his individual property. The doctrine of Kimberly v. Patchin has been incorporated into the Sales Act,[21] though it has not been approved by all American courts, and has been repudiated by the English decisions.

19. **Goods made to order.**—When one person orders goods of a certain kind to be made by another, the question arises as to when they intend that

[21] § 6 (2).

title to the goods to be made shall pass. They may have in mind any one of three things. First, that the contract is merely a contract for work and labor, and that whatever materials are furnished on which the labor is to be performed, are at once to become the property of the one for whom the work is to be done. Such a contract is not usually considered as a sale, even though there is a passing of title to the materials, piece by piece, as they are furnished in compliance with the contract. Second, the parties may intend the passing of title to some article in an incompleted state, as for instance a ship in the process of construction.[22] In such a case there is of course no difficulty in the passing of title to the thing as it then exists, and any further materials are furnished, and any further work upon such uncompleted article is done, for the buyer. Third, the parties may have in mind that title is not to pass until the thing contracted for is completed. This is the case if the seller may fulfill his contract merely by furnishing a thing of a specific kind at a certain time, i. e., the subject matter of the contract is not identified until it is completed and in some way definitely appropriated to the contract by the acts of the parties.

It may be that the mere fact of giving an order for something to be made according to the special direction of one of the parties may be considered as a previous assent given by him to the seller to appropriate to the contract any article which he may make which answers the terms of the bargain. This view

22 Woods v. Russell, 5 B. & Ald. 942 (Eng.).

has been taken by some courts. Until such an appropriation has been made, the title to the thing, whether completed or incomplete, still remains in the seller with the result that he may do with it as he pleases, may sell it to someone else, and must also bear the risk of loss. The whole question is, has the subject matter of the contract been identified by the parties and appropriated to the contract by the assent of both parties? Unless this is the case no title can have passed.

There is a great tendency on the part of most courts to treat such contracts not as contracts of sale, but as contracts for work and labor, unless the intention of the parties to the contrary is clearly expressed. The reason for this tendency is that the statutory provisions, which are found in practically all jurisdictions, require contracts for the sale of goods of a certain value to be in writing or to comply with other requirements in order to be enforcible by the courts.[23]

[23] See Chap. XIX, §§ 143 to 147, for further discussion of contracts for work and labor.

CHAPTER IV.

UNASCERTAINED PRICE.

20. **Weighing or measuring still to be done.**—In the case of Hansen v. Meyer,[24] it was stated that "If anything remain to be done on the part of the seller as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property is not attached in the buyer." The proposition as thus stated seems to lay down a hard and fast rule that title cannot pass where something remains to be done on the part of the seller, such as weighing or measuring, in order to determine the price, but in later cases the rule was modified so that it is now merely a rule of presumption to aid us in determining whether or not the parties really intended that title should pass under such circumstances.

21. **By whom acts are to be done.**—If the acts still remaining to be done are to be done by the buyer, then it is presumed that they are merely for his satisfaction and were not meant by the parties as showing an intention that title should not pass until they were performed. But if the acts are to be done on the part of the seller it is somewhat more reasonable to suppose that he does not intend to give up his property right in the goods until he is

[24] 6 East 614 (Eng.).

entirely sure of the exact amount to which he is to be entitled as the purchase price, though the same reason would not apply when such acts are left to the buyer who would thus determine the amount due. Having given up the possession and control of the goods, there is nothing in the conduct of the seller to give the inference that he does not mean to pass the title also, but rather he appears to be perfectly willing to pass the title and shows his trust and confidence in the buyer by leaving it to him to determine the exact price.

22. **Effect of the presumption.**—It should be borne in mind that the rule as we now have it with reference to acts of the seller still remaining to be done, as preventing the passage of title, is merely a rule of presumption, that is, it is simply a rule to aid us in determining what is the actual intention of the parties, and not an absolute rule as it was perhaps originally understood, which should prevent the passing of title. Thus, if A sells to B all the grain in a certain bin at the rate of one dollar per bushel, it is presumed that A has not meant to give up his title until he has actually determined the quantity and thus fixed the exact amount to be paid, and in the absence of any evidence to the contrary we would assume that such was his intention. However, if the buyer can show that even though the seller was to do the weighing and measuring, it was the intention of the parties to pass the immediate property right to the goods, such evidence would overcome the presumption and the title would be determined to have passed.

This rule of presumption is a way of getting at what the parties intended in the absence of any evidence, but it will be overcome and their actual intention given effect if the proper evidence can be produced. It is to be noticed that this rule is properly applied only in cases where the goods are distinctly specified, to determine whether the parties intended title to pass with reference to these goods. It should not be confused with the rule that goods must be identified, and if the thing remaining to be done is some act necessary to specify the goods which shall be the subject of the contract, then the minds of the parties have not met with reference to the particular goods and there is as yet no possibility of the transference of title. It is a presumption to help determine whether the title to particular goods has passed, and not for the purpose of determining to what goods the parties intended to pass title.

CHAPTER V.

SALES ON CONDITION.

23. **Contracts to sell on condition.**—When the parties in contemplating a sale of goods have not intended that there shall be an immediate passing of title, their bargain must be in the nature of a contract to sell rather than a sale. If they have fixed some time, or the happening of some event, in the future as the time when the title shall pass, until such time there can be no sale. This is true even though the parties have made a transfer of possession of the article which is the subject matter of their contract. Thus if A should give his horse into B's possession with the understanding that if he proves satisfactory B shall pay A one hundred dollars, the horse is still A's horse, for the parties do not contemplate the passing of title until some future event. It will turn into a sale upon the happening of a certain condition, i. e., if the horse proves satisfactory to B. Before the horse can actually become the property of B there must be some intent to take title as shown either by the buyer's acts or conduct.[25] The Sales Act[26] states the rule thus: "When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer when he sig-

[25] Hunt v. Wyman, 100 Mass. 198, LEADING ILLUSTRATIVE CASES.
[26] § 19, rule 3 (2).

nifies his approval or acceptance to the seller or does any other act adopting the transaction."

24. **Sale and return.**—A situation which at first glance seems very much like the contract to sell, is an agreement of "sale and return." Here the parties contemplate an immediate passing of title with a further agreement that the buyer may have a right to pass the property back upon the happening of some future event. Thus A sells his horse to B for one hundred dollars, the parties meaning and intending that not only possession but also the property right shall be changed at once, but with the further agreement that if the horse does not prove satisfactory B may return him. If B does so return the horse properly he may recover back any money which has been paid, but until he has done so the horse is his and he merely has by this agreement the right to pass the title back to the seller.[27]

The statement of the law as given in the Sales Act[28] is: "When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time has been fixed, within a reasonable time."

25. **Risk of loss in above cases.**—In the above case of sale on condition, which really amounts to nothing

27 Carter v. Wallace, 32 Hun 384 (N. Y.), LEADING ILLUSTRATIVE CASES.
28 § 19, rule 3 (1).

more than a contract to sell under certain conditions, since the property right remains in the seller until some future time when the buyer determines to take title, it follows that the risk of loss is upon the seller, for in the meantime the horse is his, and therefore, if the horse is injured or destroyed without fault of either party the loss must be on the one who at the time is the owner, that is, the one who has contracted to sell.

But in the second case where the agreement is for the sale and return, the horse is at once the property of the buyer and the risk of loss is upon him. Therefore if the horse should die before the buyer has exercised his right to return, which really amounts to a right to pass the title back, the buyer must bear the loss, for it is his horse which has died, and he now has no horse to return, that is, he has no title to a horse to pass back.

26. **Cash sales.**—Where the parties intend that there shall be no property right in the thing transferred until the price is paid, before this event has taken place there is nothing but a contract to sell. This is the situation in the case of sales of goods over the counter where no credit is extended. Here the merchant does not intend to part with his goods until he receives the money and even though the merchant should place the goods in the customer's hands, if it is with the understanding that the money shall at once be paid, the customer gets no property right in the goods until the payment is made. The cases are not, however, limited only to sales of goods over the counter, but the principle also applies to

any case where a strictly cash transaction is intended, that is, where immediate payment of cash is contemplated, the parties do not intend to pass title until such payment is made. Such sales, however, should be distinguished from the special cases where, although the parties do intend the transfer of a present property right in the goods, they still, for the purpose of security, put off the transfer of the actual title until payment which is to be made at some later time.[29] But it should not be inferred that in every sale which is stated to be "for cash" there is no passing of title until actual payment. The whole question is one of the intention of the parties. "The phrases 'terms cash' and 'cash down' may or may not import that payment of the price is made a condition precedent to the transfer of title, according to the intent of the parties. If by the use of these terms the parties understand merely that no credit is to be given, and that the seller will insist on his right to retain possession of the goods until the payment of the price, the sale is still so far completed and absolute that the property passes; but if it is understood that the goods are to remain the property of the seller until the price is paid, the sale is conditional and the title does not pass."[30] But here, as in all other cases, "For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."[31]

[29] See Chap. VI.
[30] Clark v. Greeley, 62 N. H. 394.
[31] Sales Act, § 18 (2).

CHAPTER VI.

TITLE RESERVED FOR SECURITY.

27. **Nature of transaction.**—The term "conditional sale" has come to be applied to a particular class of cases in the law of sales, differing entirely from the sales made upon some condition as discussed in the previous chapter. In the sale on condition, there is some condition named which is precedent to the passing of title, and until this condition is complied with there is no actual sale but only a contract which may, upon the happening or performance of the condition named, result in a sale. In the case of what is technically termed a "conditional sale," the sale really takes place at once with a provision for the revesting of the property rights in the goods in the seller if he wishes, if there should be default in payment. In one case the making of the sale is dependent upon some condition and in the other case it may be defeated upon the happening of some condition arising after the sale has been in fact made. In conditional sale, as the term is thus used, the parties intend the present transfer of all property rights in the subject matter of the sale with a special agreement whereby the title is reserved by the seller, not for the purpose of preventing a change of ownership but merely for the purpose of giving to the seller adequate security for the purchase price.

28. **Compared with chattel mortgage.**—At first glance it might seem impossible for the parties to intend to change all property rights in the goods without passing the title also. But something very similar to this is accomplished by giving a chattel mortgage for security. Suppose that A wishes to borrow one hundred dollars from B, offering as security therefor a certain horse. He might give to B as security for the loan a chattel mortgage on the horse, which would consist of a document in form transferring title to him, with a clause providing that the transfer shall be defeated upon the payment at a certain time of the sum of money secured by the mortgage. The mortgagor, the one borrowing the money, has not meant to give up his entire property right in the horse in the meantime, but has only intended to give security to the mortgagee, the lender, for the sum of money advanced.

The parties may intend to accomplish the same result without going through all the formality of the seller first transferring the title absolutely to the buyer, and the buyer then transferring it back conditionally as security to the seller. They may accomplish the same purpose if the seller should in the first instance retain such title in himself for the purpose of security and yet intend to pass and the other party intend to receive all other property rights in the goods, the seller giving up such title when security is no longer needed, that is, when the purchase price is paid, just as, in the case of a chattel mortgage, the mortgagee gives up his title upon the payment of the debt which the mortgage was given to secure.

29. **Same subject.**—But during all this time, in the case of either a chattel mortgage or a conditional sale, the parties intend that all property rights in the goods shall be in one case in the mortgagor, and in the other case in the buyer, and in each case there is a definite amount of money due, for which the title only is held as security, which must be paid in order that the real owner may again assume absolute and complete ownership and control over the goods, and which, if not paid, will give the mortgagee in the one case, or the seller in the other, the right to realize on his security in order to secure for himself the payment of the sum of money which is due. Though the two transactions are very similar and aim at the accomplishment of the same result, they are treated in the law as distinct and separate subjects, though the principles which apply to one case may by analogy be applied to the other. The situation, therefore, seems to be that even though title is retained by the seller for security until payment of the purchase price, if the parties actually intend that in all other ways and for all other purposes there shall be an actual sale of the goods and a transfer of the property rights in the same, the law will give effect to their intention and treat the transaction as creating what they have called a "conditional sale."

30. **Contract in form of a lease.**—Often the seller, in order to conceal the exact nature of the transaction, thus hoping to retain a greater power over the goods, will designate the transaction as a lease, calling the payments to be made rent. However, the

court will not be deceived by names, and if the real intention of the parties is to give the seller security for the purchase price, and make the buyer indebted for a certain sum to be paid in installments, upon the full payment of which he is to receive title, the court will declare such a transaction what it really is, a conditional sale, regardless of what the parties have called it, and will treat it as such in working out all the rights of the parties, and in determining what the liabilities of each of them are.

31. **Provisions for forfeiture or resale.**—Provision is often made in such contracts giving the seller the right to resell the property or to reclaim it and keep it as his own if the buyer is in default in any of his payments, and also stipulating that the buyer, if in default, shall forfeit any payments which he may have made upon the purchase price. If the buyer has agreed to thus give up his property rights upon being in default there seems no legal reason why he should not be held to his bargain if it was fairly made in the beginning. "It is for the parties, and not the courts, to make contracts." However, since there is so great opportunity for the unscrupulous to take advantage of the improvident through such harsh bargains, the right to declare and give effect to such forfeiture has been limited by statute in many states. Where such forfeitures are thus regulated, the parties often resort to the form of a lease in order to conceal the nature of their transaction, but as stated in the previous section, the court will, in such cases, look at the facts, and declare the transaction to be what the parties have

really intended it should be and not what they have called it.

32. **Risk of loss.**—Nothing will show more clearly where the actual property interest in the goods is than the determination of the one upon whom should fall the risk of loss. If the buyer really owns the goods and owes a debt for their purchase price, then the loss of the goods should fall upon him, just as much in the case where the seller has retained the title for security as where the owner of goods has given a mortgage thereon to secure a debt. If the parties meant that there should be no transference of any interest in the goods until the happening of some future event, then this is a pure sale dependent upon a condition, or a contract to sell, and the risk of loss remains in the seller. But since everything in a "conditional sale" looks to the present change of all ownership in the goods, if such is the intention of the parties, their intention should be given effect, and the mere fact of giving security for the debt created for the purchase price should not be used to defeat their actual intention to make a present sale, no matter what may later happen to the goods.

In general the courts have placed the burden of loss upon the buyer, who not only may lose the goods, but must still pay the price, for the debt was created and must be paid, and the loss of these particular goods is no different from the loss of any other goods that the buyer may possess which he has not paid for, and must be borne by him in the same way.[32]

[32] Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68, LEADING ILLUSTRATIVE CASES.

Thus in Hollenberg Music Co. v. Barron,[33] in the sale of a piano the seller had retained title for security, such title to be given to the purchaser upon making full payments according to the contract, with a provision that upon failure to pay any three or more payments the whole purchase price was to be due. Under this agreement the seller had taken possession of the piano to secure payment of the balance due, and the piano was destroyed without his fault while so in his possession, yet it was held that this loss was upon the buyer, who was still compelled to pay the full purchase price. The case was treated so far as the loss was concerned just as if it had been one of actual chattel mortgage instead of conditional sale, where the mortgagee has taken possession of the property in order to enforce his claim. To thus place the risk of loss upon the buyer is according to the weight of American authority and has been stated in the Sales Act[34] as follows: "Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of delivery."

33. **Statutory provisions for recording.**—Whenever there arises a situation in which title is in one person while the actual property rights are in another, there is always great possibility for the com-

[33] 140 S. W. 582 (Ark.).
[34] § 22 (a).

mission of fraud unless some special provision is made for the protection of innocent parties. When there has been an out-and-out sale with an actual passing of title to the purchaser, if his general creditors should seek to seize such property in payment of their claims, the purchaser, by entering into collusion with the one from whom he had purchased, could defeat their rights by getting the seller to pretend that there was a conditional sale, and through this claim take the property into his possession and later return it to the purchaser. Such an agreement might easily be brought about if the seller had not yet been fully paid and no one might be able to disprove it, since such a bargain would be exclusively within the knowledge of the fraudulent parties.

But even when the conditional sale has been fairly and honestly made between buyer and seller, there is great danger of its being the means of injuring innocent parties in case the buyer, having full possession of the property and being apparently full owner thereof, should sell the same to an innocent third person who had no knowledge of the conditional sale. If the original seller still has the title for security he could enforce his rights against the new purchaser who would not only have paid the price to the first buyer, but would now be obliged to give up the property to the original seller in satisfaction of his claims against the goods.

Because of these and other possibilities of the conditional sale being used to the injury of innocent third persons, statutory provisions are to be found in most states requiring that unless such conditional

sales are made of record in some way, they will not be given effect as against such innocent third persons, though they may still be good as between the original parties to the agreement. The method of, and provisions for, such recording are usually similar to those that apply in the case of chattel mortgages, but in the absence of special statute on the subject, the mere provision for recording of chattel mortgages would not cover the case, for the conditional sale, though similar in effect to a chattel mortgage, is still a distinct and different thing, and is so treated by the courts.

CHAPTER VII.

BILLS OF LADING.

34. **Nature of bill of lading.**—When goods are shipped by the seller in compliance with an order from the buyer, title would ordinarily pass when the goods are put into the hands of the carrier for transportation if the buyer is to pay the freight, as is generally the case. But the seller may control and prevent such passing of title by taking from the carrier a bill of lading. This document consists not only of a statement of the goods received, but is also a contract by which the carrier agrees to deliver the goods to a certain person named, or to anyone whom he may order. Dependent upon the form in which the bill of lading is issued, it may be absolutely necessary to have possession of this bill in order to secure the goods from the carrier.

35. **Straight bill.**—The form in which the bill of lading is sometimes issued may amount to nothing more than a mere receipt for the goods, with, perhaps, added statements with reference to the contract of carriage, the carrier only agreeing to deliver to a named person. If by the bill the carrier undertakes merely to deliver the goods to John Smith, its full contract would be performed by making delivery to the particular person named, and it would not be necessary that the bill of lading in such a case should be given up, for the carrier

would have performed its full duty. When the bill of lading undertakes merely to deliver the goods to a named person, without stating that they will be delivered to him "or his order," it is called a "straight bill," and in effect is nothing more than a receipt for the goods. In such a case the person named gets the title to the goods when they are shipped to him and the obligation of the carrier so far as concerns the person to whom delivery is to be made is no different than if no document had been issued.

36. **Order bill.**—But the carrier, by issuing the bill in the form of a promise to deliver the goods to "John Smith or his order," assumes not only the simple duty of delivering to John Smith, but further undertakes to deliver to anyone whom John Smith may designate by indorsement on the bill of lading. Therefore the carrier would not be safe in delivering the goods without getting a surrender of the bill of lading, with the result that it is impossible to deal effectively with the goods while they are subject to such a bill of lading, without dealing with the bill itself. In other words we deal with the document which represents the goods rather than with the goods themselves. A bill of lading in this form is called an "order bill" or a "negotiable bill." The Sales Act[35] defines a negotiable document of title as "A document of title in which it is stated that the goods referred to therein will be delivered to the bearer or to the order of any person named in such document."

[35] § 27.

37. **A representative of title.**—By taking an order bill of lading the consignor is considered to have so definitely expressed his intentions with reference to controlling the title to the goods that it will outweigh any other acts on his part which might ordinarily show a different intention. Thus, if the seller takes the bill of lading to his own order, the title will still remain in him even though in the absence of taking such bill the title to the goods would have passed to the buyer upon delivery to the carrier. Since the carrier cannot safely deliver the goods without getting the surrender of an order bill of lading, business men have come to look upon the bill as representing the goods themselves, or the title to the goods, so that the only way in which the goods can be dealt with is through the bill of lading, so long as the goods are in the carrier's hands, subject to such bill. Therefore, if one should attempt to buy goods which are in the carrier's possession, he must know that they may be subject to such a bill of lading and that if this is the case he cannot get the title to the goods without getting the bill of lading, which by the act of the consignor of the goods was taken to represent the title while the goods are being carried.[36]

38. **Negotiability.**—When the bill of lading is in the form of an "order bill," it is usually spoken of as a negotiable bill, i. e., it may be transferred by the person described therein by indorsement upon it in the same manner in which bills of exchange

[36] First Nat. Bk. of Cairo v. Crocker, 111 Mass. 163, LEADING ILLUSTRATIVE CASES.

or promissory notes would be transferred. Such indorsement is treated, not as merely transferring the right to get the goods, but as actually transferring the goods themselves, since the bill now stands as the representative of the goods and the goods can be dealt with only by means of the bill.

39. **Extent of negotiability.**—There has been considerable difference of opinion as to the exact extent to which the idea of negotiability should be carried in the case of the order bill of lading. This difference has been not between the courts themselves in their interpretation of the effect to be given to negotiability in such a case, but between the courts, on the one hand, and the understanding and intention of business men on the other. It is the custom of business men to treat the bill of lading as if it were the goods themselves, and if one purchases a bill of lading, properly indorsed, to consider him as the owner of the goods. The courts, however, have not, in general, been willing to go the whole way and give full effect to negotiability, but have usually been willing only to admit that the bill might be transferred by indorsement, but that the possession of it would not give the holder power to transfer any better title than if he had possession of the goods themselves, which it represents. Thus, if one should get possession of goods, either through fraud or mistake, or by finding them, he would not be able to convey any better title than he himself had, and if he has no title, then he could convey none, and the courts have held that one getting possession of a negotiable bill of lading would

be limited in the same way.[37] The custom of merchants, on the other hand, is to treat the bill of lading not merely as representing the goods and transferable by indorsement, but to treat it as the title to the goods in such a way that anyone getting such bill and appearing to come within its terms as the person entitled to the goods may pass a good title thereto by transferring it to an innocent purchaser for value, just as he could in the case of a promissory note or other commercial paper. Thus, if a promissory note has been indorsed in blank, that is, so as to make it payable to anyone holding it, a holder of the note could pass a good title thereto to an innocent purchaser for value, even though he had been merely entrusted with possession, or even if he had secured possession by some wrongful act. Business men, in dealing with order bills of lading, treat them in this way, that is, as representing title rather than as a mere symbol of the goods.

40. **Legislation with reference to negotiability.** —Since the view of the court fixes the rights, regardless of what business men may wish or intend, the result has been statutory provisions in many states, declaring the full negotiability of such bills of lading. Such provisions are contained in the Uniform Bills of Lading Act,[38] which provides that "A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired," thus including even a finder or a thief among persons who could pass good

[37] Stollenwerck v. Thacher, 115 Mass. 224, LEADING ILLUSTRATIVE CASES.
[38] § 31. For list of States which have adopted Uniform Act see note p. 152.

title to an innocent purchaser as in the case of bills and notes. The Sales Act,[39] as generally adopted, does not go quite so far, but provides for the passing of the title "By any person to whom the possession or custody of the document had been entrusted by the owner." Some states, however, in passing the Sales Act have followed the provisions of the Bills of Lading Act on this point. There is legislation declaring bills of lading negotiable in other states which have not as yet adopted either the Uniform Bills of Lading Act or the Uniform Sales Act. The result is that most courts, in the absence of this or similar legislation, would not give any greater effect upon property rights in the goods through a dealing with the bill of lading, than would be allowed if the parties had been dealing directly with the goods themselves, and recognize negotiability only to the extent of saying that the holder of goods may transfer whatever right he has to them by the indorsement of the bill of lading.

41. **Risk of loss—Bill of lading in buyer's name.** —When the seller takes out the bill of lading in the buyer's name, it is clear that the title at once passes to the buyer and the risk of loss is upon him. This is true even though the seller, after getting such a bill of lading, retains possession thereof to secure the payment of the purchase price, such retention of possession amounting to nothing more than a lien which will prevent the buyer from getting actual possession of the goods until such bill is surrendered by the seller, who may retain it

[39] § 32.

until he receives payment for the goods which it represents.

42. **Same subject—Bill of lading in seller's name.**—When the bill is taken by the seller in his own name, though he thereby retains title, his intention may be the same as in a case of conditional sale, that is, though he intends to pass the property right in the goods, he wishes to retain the title in himself for security until payment for the goods has been made. Some courts have given effect to this intention of the seller and have placed the risk of loss as they have done in the case of conditional sale, that is, upon the buyer who has the actual property right in the goods, even though the bare legal title has been retained by the seller for his security. Other courts have refused to recognize any property right in the buyer unless the bill of lading is actually made out in his name or properly indorsed over to him. The Sales Act[40] and the Uniform Bills of Lading Act[41] have adopted the security title idea, if this is what the seller intended in taking the bill in his own name. In each act it is provided that "if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

43. **When bill of lading does not represent the goods—Consignor having no title.**—One cannot get

[40] § 20 (2).
[41] § 40 (b).

any right or title to goods which he does not own by giving them to a carrier and taking a bill of lading therefor. Thus, if A steals the goods of B, and ships them to another place, taking a bill of lading for them to his own order, even though he should sell such bill to an innocent purchaser for value, such purchaser would get nothing, for the bill represents nothing, since it was never properly issued and never represented any goods of the consignor. Such a purchaser can look only to the one from whom he purchased for satisfaction. This is an entirely different situation from that of wrongfully selling a bill which has been properly issued.

44. **Same subject—Goods never received by carrier.**—An even clearer case in which the bill of lading gives no right in any property to a purchaser, is where the carrier has issued such bill without ever having received the goods which it purports to represent. Clearly it is not a representative of any goods, and never has been. But in such a case the carrier would be liable for having wrongfully issued such a bill, by reason of purchasing which, the buyer has suffered a loss; and in many states the carrier is, by statute, declared to be guilty of a criminal offense in so doing, and it is so provided by the Uniform Bills of Lading Act.[42]

45. **Same subject—Goods no longer in carrier's possession.**—Even though the bill of lading was originally effective, it remains so only so long as the goods remain in the carrier's possession, and if the goods have been delivered to the person who

[42] § 44.

is actually entitled by the bill to receive the same, any later transfer of the bill of lading will pass no rights. The bill is a "spent bill," and by the delivery of the goods out of the carrier's possession it has lost all force and effect. Though the purchaser in such a case would not get the goods, still he would have a right of action against the carrier for his loss, for it was its duty to deliver the goods only on the surrender of the bill of lading, and the failure to do so has caused the injury to the innocent buyer, an injury which the carrier must have foreseen as possible and for which it should, therefore, be liable.

46. **Warehouse receipts.**—Where goods are stored in a warehouse and receipts issued therefor it is customary to deal with these receipts as representatives of the goods themselves somewhat as in the case of bills of lading, though most courts have refused to go as far in recognizing them as documents of title as in the case of bills of lading. This question also has been largely covered by statute in many states, and in the Uniform Warehouse Receipts Act[43] such documents, where goods are deliverable "to the order" of the person named, are declared to be negotiable, and by their negotiation and transfer the property right in the goods themselves is passed, though this act, as originally drawn up, does not provide for negotiation by "any person in possession," but only by one "to whom the possession or custody of the receipt has been entrusted by the owner."

[43] § 40.

CHAPTER VIII.

VENDOR'S LIEN.

47. **Nature of the right.**—The vendor's lien is the right which the seller has to retain possession of the goods after title has passed, until he receives payment of the purchase price. Unless there is some special agreement to the contrary this right may always be exercised by the vendor.

There must have been an actual sale of the goods with a passing of the title thereto in order that the case be a proper one for the application of the vendor's lien. The whole idea of it is that the seller is retaining the possession of the goods which now belong to the buyer as security for the purchase price. If the seller has provided for security in any other way, the principle of vendor's lien is not applicable.

48. **For purchase price only.**—This lien is given by the law and does not depend upon any agreement of the parties and always exists unless the parties have made some special agreement inconsistent with it. It does not cover any claim other than that for the actual purchase price due for the particular article which has been sold and which is being held under this lien as security therefor. Thus, if A sells a horse to B for $200, B paying $100 cash, but without credit being extended for the remaining $100, A may retain the horse until this

$100 is paid, but he cannot hold him for any other debts which may be owing to him by B. Neither can the goods be held for any charge which the seller might claim for holding and caring for them while attempting to enforce his rights under the lien. Thus, in the case above stated, if A has retained the horse for the purpose of securing the payment of the price, he cannot claim anything for the expenses of so keeping him. The law gave the seller the right to hold the property under his vendor's lien, but he was not required to do so; therefore, if he decides to hold under his lien he must bear the expense of so doing. "No person has, by law, a right to add to his lien upon a chattel a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession."[44]

49. **Dependent upon possession.**—The fundamental idea in vendor's lien is possession. If the seller has once voluntarily parted with possession, without being induced to do so by fraud, his lien is gone and he will have to seek payment of the purchase money due him like any other creditor, and he cannot revive the lien in any way. Of course the buyer may voluntarily surrender to the seller for security the property purchased if the rights of other parties are not thereby injured, but this is not strictly a vendor's lien, for the buyer was under no obligation to do so, and might have given any other property he possessed as such security

[44] Somes v. British Empire Shipping Co., 8 H. L. C. 338 (Eng.).

for the debt which he owed for the purchase price. The surrender of possession by the seller amounts to a waiver of his lien even though payment is not made as expected by the seller.

50. **Goods in buyer's possession at time of sale.**—If at the time that the sale is completed the goods are already in the buyer's possession, the seller has no lien on them, since the situation is now the same as in the case where the seller has actually delivered over the possession after the sale has been completed. But if the goods are in the hands of some third person at the time of the sale, such person continues to hold as he has been holding, i. e., for the seller, and consequently the seller's lien continues until there has been some new agreement entered into that such bailee shall now hold the goods for the buyer.

51. **Partial delivery.**—Each part of the goods may be held under the vendor's lien as security for the whole purchase price or any proportion thereof remaining unpaid. Thus, if one-half of the purchase price remains unpaid, the seller may retain all the goods as security therefor, or he may deliver all but a small fraction, and then hold that amount under his lien to enforce payment of the whole or whatever portion of the purchase price remains unpaid.

52. **Agreements inconsistent with lien.**—The vendor's lien may be exercised only when the seller is entitled to demand payment of the price before giving up his possession of the goods. Therefore, any agreement to give credit to the buyer contem-

plates that payment is to be deferred, and that the buyer is to be given possession of the goods before making payment of the price. If A sells goods to B, giving him thirty days within which to pay for the same, B is entitled to secure possession of the goods at once and A has no right to refuse delivery until the period of credit has expired and payment is made. If A refused to give up possession in such a case B could take the goods from him by legal process.

The effect of a bargain giving credit to the buyer for the payment of the purchase price is in effect an agreement to waive the vendor's lien and the seller cannot hold the goods except under certain special circumstances[45] which will be mentioned later.

53. **Resale by buyer.**—If the buyer resells the goods to another, and the seller agrees to hold them for the latter, this amounts to a waiver of the vendor's lien, for such lien exists only against the original vendee, and if vendor agree to hold for a sub-vendee, the result is the same as an actual delivery to the buyer and a re-storing of the goods by the sub-purchaser with the original seller. So, a delivery of a part of the goods to such sub-purchaser amounts to a recognition of his right in the goods and shows an intention no longer to retain the goods under the vendor's lien. The new purchaser is not indebted to the original seller, and having recognized the new purchaser as entitled to the goods, the seller cannot later change his mind and withhold them. The new purchaser owes him no

[45] Arnold v. Delano, 4 Cush. 33 (Mass.), LEADING ILLUSTRATIVE CASES.

debt, and by recognizing a right in the new purchaser he has waived his right as against the original buyer. The recognition of the sub-purchaser as owner is equivalent to an actual delivery of the goods.

54. **Revival of lien.**—If the seller has once voluntarily given up possession of the goods, in the absence of any fraud on the part of the buyer, his lien is gone. This is true even though the buyer cannot pay for the goods. The seller's claim for the purchase price is now on no different basis than the claim of any unsecured creditor, and the particular goods which he has sold to the buyer are the buyer's goods as much as any other property he may have and hence are subject to any of his debts, and the debt for the purchase price will be given no preference.

But even though the seller may have waived his lien by giving credit to the buyer for the purchase price or making any other agreement inconsistent with the vendor's lien, so long as it does not amount to a delivery of the goods, the lien will be revived if the buyer should become insolvent while the goods are still held by the seller for the buyer. It is said that the credit is given on condition that the buyer keep his credit good.[46] So also, if the seller, even though having given a certain period of credit, is still left in possession of the goods, when the period of credit expires, the lien will immediately revive, and this is true regardless of the solvency or

[46] McElwee v. Metropolitan Lumber Co., 37 U. S. App. 266, 16 C. C. A. 232, 69 Fed. 302.

insolvency of the buyer. The important thing to be borne in mind with reference to the revival of the lien in case of insolvency or expiration of credit, is that the seller is still in possession of the goods, holding them for the buyer.

55. **Termination of lien.**—The buyer may terminate the vendor's lien by making tender of the amount due. If the seller then improperly refuses to receive payment he may nevertheless be compelled to surrender the goods, for his only right was to hold them to enforce payment, and if payment has been offered, it shows that he is not holding them for that purpose, and any other detention of the goods is wrongful. The buyer could then bring replevin for the goods in order to secure the possession.

56. **Possession secured by fraud or theft.**—If the buyer has secured possession of the goods by practicing some fraud on the seller to induce him to surrender possession, as by representing that he wants them for some special and temporary purpose and then refusing to return them, as between the buyer and the seller the lien is not lost, but the seller can recover the possession of the goods and thus revest his lien. The seller has the right of possession in such case and can enforce his rights by legal process. But if the buyer, having thus obtained possession by fraud, should sell the goods to an innocent purchaser for value without notice of the fraud, such purchaser would get a perfect right to the goods as against the original seller, for the lien being dependent upon possession, if the pos-

session is given up even though this was induced by fraud, the buyer, having title, can pass a complete property right to an innocent purchaser, just as one who has obtained the title to goods by fraud can, nevertheless, pass a perfect title to an innocent buyer.

But if the seller has not voluntarily given up possession but possession has been taken from him wrongfully by the buyer, as by theft, it would seem that the vendor's rights are not divested, and even an innocent purchaser from the buyer would not get the property free from the lien, and would in fact get no greater right than his immediate vendor had. That is, though he would get title, he would not be entitled to possession, and the original seller might recover the possession just as he might have recovered it under such circumstances from the original vendee.

57. **Enforcement of lien.**—With ordinary liens generally the only right is to retain possession to enforce payment, with possibly the right, upon failure to pay, to secure a foreclosure of the buyer's rights in the property, but other than this the seller can do nothing to realize upon his security. "The vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully * * * retains them (the goods) * * * he can, by a sale made on notice

to the vendee, vest a purchaser with a good title. His right is very nearly that of a pledgee, with power to sell at private sale in case of default."[47] The Sales Act[48] has stated very concisely the general rules with reference to the rights of the unpaid seller against the goods as they have been developed and generally recognized by the courts.

[47] Tuthill v. Skidmore, 124 N. Y. 148.
[48] §§ 53, 54, 55, 56.

CHAPTER IX.

STOPPAGE IN TRANSITU.

58. **Nature of right.**—Stoppage in transitu refers to the right which is given an unpaid seller to stop goods which are in the hands of a carrier in process of transportation from the seller to the buyer, when the buyer becomes insolvent. It refers always to a case where the title has already passed by reason of the shipment, but the goods have not yet reached the buyer and are still being held by the carrier under the original direction given to it by the seller. The effect of stoppage in transitu is practically the same as if the vendor were allowed to revest himself with his vendor's lien, and it has sometimes been spoken of as an extension of the vendor's lien. But it is a right separate and distinct from vendor's lien, as is shown by the fact that it differs in two very material respects, first, in that it is exercised only after the vendor has parted with possession, and second, its exercise is dependent entirely upon the insolvency of the buyer. It is true, however, that after its exercise, the vendor is placed in practically the same situation as if he was holding the property under an actual vendor's lien. The situation is thus summed up in the Sales Act:[49] "When the buyer

[49] § 57.

of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he then becomes entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession."

59. **How exercised.**—The right is exercised by notice being given to the carrier to stop the goods and withhold delivery. This notice may be given to any proper agent of the carrier, and such agent must use due diligence to see that such notice will be forwarded to the agent who has the custody of the goods. "To make a notice effective as a stoppage in transitu, it must be given to the person who has the immediate custody of the goods; or, if given to the principal, whose servant has the custody, it must be given * * * at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee."[50] If, after proper notice received, the carrier should nevertheless deliver the goods to the consignee, the carrier would be liable to the consignor for conversion of the goods.

60. **Insolvency of buyer.**—One absolute requirement, in order that the seller may exercise this right, is the insolvency of the buyer. Without such a showing the vendor's acts would be improper and he could keep no hold on the goods since he has lost

[50] Whitehead v. Anderson, 9 M. & W. 518 (Eng.).

his strict vendor's lien by giving up possession. In order to show insolvency such as to entitle the seller to exercise this right, it is only necessary to show that the buyer is not meeting his obligations as they come due, and it is not necessary to show that there has been any judicial declaration of such condition. Thus it may happen that a buyer's assets may be much greater than his liabilities, yet if he has failed to pay his debts as they have matured, the seller is justified in treating him as insolvent and may stop the goods. But if, as a matter of fact, the buyer's liabilities do exceed his assets, even though he has met his obligations as they matured, yet in such a case the buyer is actually insolvent, and the seller is entitled to stop the goods. "It is sufficient, if, before the stoppage in transitu, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary, apparent evidences of insolvency."[51] How great the insolvency may be is not material, but the right may be exercised if the buyer is insolvent at all. But there must be actual insolvency or evidences of insolvency at the time the goods are stopped or before the goods arrive. If the seller knew of the buyer's condition, but nevertheless shipped the goods, then he has waived his right and will not be allowed later to change his mind and attempt to exercise it, but even though the buyer was insolvent when the goods were shipped, the seller may stop them if he did not know of the insolvency before the goods were sent.[52]

[51] Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124.

[52] Loeb & Bro. v. Peters & Bro., 63 Ala. 243, LEADING ILLUSTRATIVE CASES.

61. **Goods subject to negotiable bill of lading.**—If the seller has had a negotiable bill of lading issued for the goods and such bill of lading is outstanding, the seller's right to stop the goods in transitu will be subordinate to the right of anyone who purchases such bill of lading in good faith and for value, and it would seem that it should make no difference whether such transfer of the bill of lading took place before or after the notice of stoppage in transitu was served, for the seller should be estopped from setting up any claim to the goods as against an innocent purchaser of the bill of lading which the seller has caused to be issued and on which he must know that an innocent purchaser will rely and upon which he will advance his money. This was the view held in Newhall v. Cent. Pac. R. R. Co.,[53] and this view has been adopted in the Sales of Goods Act.[54]

62. **Stopping proceeds of the goods.**—Though some English cases have allowed the seller to stop the proceeds of the goods when the seller has taken a negotiable bill of lading, which he has pledged as a security for a loan, as in a case where a bank has advanced the price of the goods to the seller on the security of the bill of lading, and has allowed the seller to secure whatever surplus of proceeds had remained after satisfying the claims for the loan made by the bank holding the bill of lading for security, no American cases seem to have taken this view. The attitude of the American cases is that if the seller has put himself in such a position

[53] 51 Cal. 345.
[54] § 59 (2).

that he cannot stop the goods themselves, then his entire right is gone and he cannot get any security from the goods or their proceeds.

63. **When transit begins.**—The transit is considered to have begun as soon as the goods have been taken in charge by the carrier for the purpose of transportation. Before such time, if the title has passed, the goods are subject to the vendor's lien and may be stopped while on the way to the carrier under such lien, as the person who has them in charge is acting strictly for the vendor and hence the goods are still in the vendor's possession. If, as is the usual case, the title is not to pass until the goods are given into the charge of the carrier, then no question of either vendor's lien or stoppage in transitu is involved, since the goods are still the vendor's goods and he may prevent title from passing at all if he wishes. In order that the transit be considered to have begun so that the right of stoppage in transitu may be properly exercised, the goods must have left the seller's possession, and must be in the hands of some one standing between the seller and the buyer who does not directly represent either party but holds the goods only for the purpose of transporting them according to the original direction given to the goods by the seller.

64. **In whose hands goods may be stopped.**—Though the usual case where the right of stoppage in transitu is exercised is where goods are in the hands of a common carrier, still it is not essential that they be in the hands of one who occupies exactly this position. It is only necessary that the

party in possession be a step in the course of effecting the delivery from the seller to the buyer, in such a way that he is not acting solely for the one or the other of the parties but stands intermediate between them so that his possession cannot strictly be considered to be that of the seller or that of the buyer. Such third person may "be a carrier, a warehousekeeper, a wharfinger, packer or other depositary, or an agent for the purpose of forwarding."[55]

The time when transit of the goods begins is stated in the Sales Act[56] as follows: "From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee."

It may not be necessary theoretically that this third person in possession of the goods be a public service company, for it may be any "other bailee for the purpose of transmission to the buyer," but practically it is very exceptional to find a case where the third person is not a public service company unless it be a case where the third person represents one party or the other in such a way that his possession would not be considered as the possession of an agent for one party or the other. The possession must be held as a step in the transit, and not purely as being vested in an ordinary bailee for either party.

[55] Harris v. Pratt, 17 N. Y. 249.
[56] § 58 (1) (a).

65. **Who may exercise the right.**—The right is given only to the seller or one acting for him as his agent with power to do such act, for the right is in the nature of an extension of the vendor's lien, given expressly for the purpose of protecting the seller by aiding him in getting the price. Thus, a creditor of the vendor cannot exercise the right, and this is true even if the debt was created by the sale of the very same goods to the consignor. One who stands practically in the situation of vendor with reference to the goods may, however, exercise the right even though he may not strictly be considered as vendor, as in the case of an agent who buys goods for his principal, advancing the money therefor, and ships them to him. He may in such a case stop the goods since his position is exactly the same as that of an unpaid vendor.

66. **When transit ends.**—When the goods come into the hands of the buyer, or someone acting directly for him in receiving them, or if the buyer has given some new direction to the goods and they are now going forward under such direction, the original transit started by the seller is at an end.[57] Any exercise of control or direction on the part of the buyer, or his securing the carrier or warehouseman to hold the goods for him, ends the transit.

When the goods have arrived at their destination the transit is not ended so long as they are in the hands of the carrier or other bailee, awaiting the buyer, and the fact that the liability of the carrier may have changed from the strict liability as a car-

[57] Becker v. Hallgarten, 86 N. Y. 167, LEADING ILLUSTRATIVE CASES.

rier to that of a warehouseman, because the goods have arrived at their destination, does not affect the case so long as the buyer has not received the actual possession. Nor does it make any difference how long they are so held by the carrier. The transit is considered to still continue until the goods actually come into the control of the buyer. But, if after the goods have arrived at their destination, the buyer enters into some new arrangement with the carrier or warehouseman, that he shall now hold the goods for the buyer, such arrangement ends the transit and therefore ends the seller's right to stop the goods.[58] The statement of the law as given in the Sales Act[59] is as follows: "Goods are no longer in transit * * * if, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer."

67. **Delivery by truckman or by express company.**—When the transit ends will depend upon the undertaking made with reference to the carriage of the goods. The obligation assumed by a railway company is ordinarily to carry to its station, and hence, after the goods are taken from its depot the original transit is ended even though the goods are still in the hands of some truckman in course of

[58] Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424.
[59] § 58 (2) (b).

delivery to the address of the buyer. Such truckman represents the buyer and his possession is to be considered either as the possession of the buyer, or as a new direction given to the goods by the buyer, in either of which cases the original transit is ended. Nor is it necessary, in order to maintain this rule, that the buyer has given new directions as to the handling or carrying of these particular goods; it is sufficient if the buyer has given general directions to the truckman to take from the station and deliver to him any freight which may arrive. The truckman is not a final step in the original transit, for the obligation of the carrier is to carry only to its station, and the truckman acts only at the direction of the buyer.

But if the carrier undertakes to actually deliver to the buyer in person, as is generally the case with express shipments, then the transit continues even after the goods are transferred to the carrier's vehicle for delivery to the buyer's residence or place of business, and if they can be stopped before actually so delivered, the seller's right of stoppage would still be effective. Thus, even after an express package has been placed on the express wagon for actual delivery to the buyer, it is still in transit under the original impetus given to it by the directions of the seller; while goods sent by freight, when they are put upon the wagon of a truckman, are treated as already in the buyer's possession so that the transit is ended.

68. **New direction given to goods.**—The right of stoppage in transitu ends as soon as the goods have

received some new direction from the buyer and are going forward in consequence of such new direction. Thus, if A in Chicago receives an order from B of Liverpool for ten thousand bushels of wheat with directions to ship the same to C in New York, who is to forward according to B's directions, after the goods have been received and redirected by C the original impetus given to the goods by the original directions given by the seller is over, and the goods are now on a new transit and hence cannot now be stopped by A.

69. **Goods intercepted by buyer.**—The seller has no right to have the goods carried to the particular destination which he has named, for there is nothing which entitles him to have the transit proceed in such a way that he will have the opportunity to stop the goods, but the right is merely a privilege granted to him if he can exercise it before the buyer gets control of the goods. If goods are sent by the seller from point A to point C, but are intercepted by the buyer at the intermediate station B, the seller cannot complain, and it makes no difference that, if the goods had gone through the whole transit as originally directed, he would have been able to stop them. The only obligation of the railway company was to deliver the goods to the buyer and this they have done, and there was nothing improper in making such delivery at station B rather than at station C. The law gives to the seller the right to stop the goods if he can exercise it before the goods get into the hands of the buyer, but if delivery to the buyer has been made before the seller expected that it

would be, still no legal right of the seller has been violated either by the buyer or the carrier, and the seller has no redress. This situation is provided for in the Sales Act[60] in the following terms: "Goods are no longer in transit * * * if the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination."

But to defeat the seller's right to stop the goods, some actual control must be exercised by the buyer over the goods themselves. Hence, a mere sale of the goods by the consignee while they are in transit will not affect the seller's right, for the buyer buys subject to the possible exercise of the seller's right of stoppage in transitu, unless he takes under a negotiable bill of lading,[61] just as one who buys goods which are still in the seller's possession, takes them subject to the seller's right to exercise his vendor's lien. The Sales Act[62] states the generally recognized law as follows: "The unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto."

The Sales Act further states: "If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subse-

60 § 58 (2) (a).
61 See Chap. VII, § 39.
62 § 62.

quent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu." This latter situation has not been passed upon, it seems, except in one case,[63] but the Sales Act adopts the view which was there decided.

Nor will the seller's rights be defeated by the action of the buyer's creditors in seeking to attach the goods and make them subject to their claims. In such case, their rights are subject to the prior rights of the seller to stop in transit and thus get a special security for his claim. The whole idea of the right of stoppage in transitu is to give a special protection to the seller and this he would be deprived of if his right might be cut off by others who should have no special claim upon these goods different from that which they might acquire with reference to any other goods of their debtor. It would not be reasonable to take away this right from the seller at the time when he needs it, and thus deprive him of what it was intended that he should have, a special hold on these particular goods to secure the purchase price due for them.

[63] Newhall v. Central Pac. R. R. Co., 51 Cal. 345.

CHAPTER X.

SELLER'S RIGHTS AFTER STOPPAGE IN TRANSITU.

70. **Compared to rights under vendor's lien.**—After stopping the goods the seller's rights are much the same as in the case of the vendor holding under his vendor's lien. "It seems to be well settled, that when the right of stoppage in transitu is properly exercised, the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property and they may be enforced in the same way."[64] The exercise of this right does not in any way rescind the sale, and until some further act is done other than to merely stop the goods, no change whatever in the situations of buyer and seller with reference to the goods takes place. Therefore, before the seller takes any further steps, the buyer or some one acting for him, or standing in his place, as assignee in insolvency, or for the benefit of creditors, may by offering the amount due secure possession of the goods. After the seller has stopped the goods, if the buyer does not redeem them within a reasonable time by paying the purchase price, the seller has his choice of any one of three remedies in order to secure the payment of his claim, the same remedies which an unpaid seller would

[64] Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124.

have under his vendor's lien. These remedies are stated in Dustan v. McAndrew[65] as follows: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own, and recover the difference between the market price, at the time and place of delivery, and the contract price."

71. **Holding the goods and suing for price.**—While in the case of the vendor's lien, the vendor may often prefer to bring his action at law for the purchase price, holding the goods as security for the judgment obtained, the seller who has stopped the goods in transit would not ordinarily care to pursue this remedy since the buyer must always be insolvent when this right is exercised, and hence a judgment against the buyer for the purchase price would never be worth the amount of the purchase price and the seller would in consequence have no advantage by reason of his position.

72. **Resale by seller.**—There is never a case for the application of vendor's lien or stoppage in transitu unless title has passed to the buyer. Nevertheless, when goods are so held by the unpaid seller he

[65] 44 N. Y. 72.

may resell the same and pass a good title to the purchaser. In giving this right of resale, the law has gone very far beyond the remedy given in the case of other common law liens, where the only right is to hold possession in order to enforce payment, with perhaps the added right to have a proceeding similar to a foreclosure for the purpose of finally realizing on the security if the buyer fails or refuses to make payment.

73. **When right of resale arises.**—The seller cannot stop the goods and immediately resell them, for the vendee, or those representing him, are entitled to the goods and all that the seller can ask for is that he receive the purchase price. Therefore the goods must be held for a reasonable time, so as to give the buyer an opportunity to act. As to what constitutes a reasonable time must depend upon the situation in the particular case. This will no doubt be affected by the character and condition of the goods and their liability to deterioration, and by the conditions of the market. The Sales Act[66] has stated the law on this point as generally recognized as follows: "Where the goods are of a perishable nature, * * * or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods."

It is sometimes said that the seller must hold until the period of credit has expired, but this limitation seems unreasonable if applied strictly in all cases and it is generally considered that one of the condi-

[66] § 60 (1).

tions of giving credit is that the buyer should keep his credit good. If the period of credit is short and the goods are such as not to be materially affected by delay, these are facts of importance in determining what is a reasonable time to wait in the particular case.

So also the condition of the buyer and the nature of his default will be material. If he is very badly involved so that there is but little likelihood of his being able to redeem the goods or if he has shown that he does not intend to redeem them, the seller may sell whether the period of credit has or has not expired. It does not seem, therefore, that the seller is bound to wait until the period of credit has expired but merely that he hold the goods, giving the buyer a reasonable time within which to redeem, and that what is a reasonable time will depend not only upon the character of the goods but also upon the condition of the buyer and the terms of the contract between the parties. The seller cannot deprive the buyer of the right to get the goods merely because the buyer is in some way in default, either by reason of delay in making payment or because of temporary insolvency, but he can resell only as it is necessary in order properly to save himself from loss because of the buyer's inability to pay.

74. **Notice of resale.**—Though some jurisdictions have required that notice of resale be given to the buyer, most courts have not required such notice, but the right to resell is considered to be a right which the buyer must know the seller has and may exercise if he does not redeem the goods within a

reasonable time. The Sales Act[67] has adopted the rule followed by the majority of courts, namely, that notice is not necessary: "It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But * * * the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before resale was made. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale."

75. **Loss or profit on resale.**—The exercise of the right of resale does not limit the seller to the amount only which is realized on such resale, but if the goods do not bring enough to pay the purchase price due for the goods, the seller will also have a claim against the buyer for the deficiency, and may charge to the buyer the costs and expenses of such resale.

If, however, the sale of the goods results in a profit over the purchase price due, such profit goes to the seller also. This does not seem entirely logical but is, nevertheless, the rule generally followed. The buyer has had his right to redeem the goods and thus secure any profit which might have been made, but having failed to do so, he has thrust upon the seller the burden of realizing a fair price and the possible necessity of bringing action to recover dam-

[67] § 60 (3) (4) (5).

ages, and therefore is in no position to claim anything for his own benefit if a profit should result from the resale. By failing to redeem, the buyer does not relieve himself from liability, but he does waive any right to any profit which may result from the activities of the seller. The seller is not allowed to charge for his own services in making a resale, but, on the other hand, the buyer who has refused to pay the price or to take the goods and realize what he can on them, ought not to be allowed to profit by the sale which he has forced the seller to make, since the seller is to receive no payment for his labor nor for the bother and trouble to which he has been subjected.

The right of the seller to place any loss because of the breach of contract upon the buyer, and to keep for himself any profit which may result, has been adopted in the Sales Act.[68] It is there provided that if the resale has been properly made by the seller, "He shall not thereafter be liable to the original buyer upon the contract to sell or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale."

76. **Resale as agent for the buyer.**—It is generally stated that in making the resale the seller is acting as the agent of the buyer, but this statement must be taken in a very qualified and limited sense. It is clear that the seller has received no special authorization from the buyer, but in fact he still has this right to resell, even though the buyer directly ob-

[68] § 60 (1).

jects to its exercise. Further, he is not acting for the benefit of the buyer but, rather, strictly for his own interest, with the qualification that in so doing he must protect the interests of the buyer and "is bound to exercise reasonable care and judgment in making a resale."[69] The object sought in calling him the agent of the buyer under such circumstances is, perhaps, to make clear the fact that he could pass a good title to a purchaser at such resale, and also to show that he has not meant to merely take the goods in satisfaction of the debt but that he is selling them to realize whatever he can and to place such amount to the buyer's account upon the purchase price. But this is using the word "agent" in a sense much different from its ordinary meaning. It is the law which makes the seller the "agent" in such cases and he does not in fact represent the buyer in any way, but acts only under the powers and for the purposes which the law allows.

77. **Keeping property as his own.**—In order to secure the purchase price, it is not necessary that the seller resell, but he may keep the property as his own, allowing its fair value upon the purchase price and bringing action for the difference, if there is any, between such present value and the contract price. But since the vendor's lien is a right to hold the goods and does not of itself show any intention to rescind the sale, it is not presumed that the seller has taken the title back unless he has done some act to indicate such an intention. Any act showing a dealing with the goods in a way inconsistent with

[69] Sales Act, § 60 (5).

merely retaining possession for security would show such intention in the absence of an express declaration of election to do so.

If the seller is allowed to keep any profit which may be realized on a resale, there seems no reason why he should not be allowed to take over the goods themselves and keep them as his own if he desires to do so. Certainly the buyer is in no position to object, since by reason of having failed to redeem the goods, he cannot now be benefited by them under any circumstances, and all he can ask is that he be credited with their fair value.

CHAPTER XI.

C. O. D. SALES.

78. **Meaning of term.**—C. O. D. or collect on delivery refers to the method of shipment employed, principally by express companies, wherein the carrier agrees not only to carry, but also to collect the purchase price of the goods from the buyer and remit the same to the shipper. This method of shipping protects the seller in that he does not give up his hold on the goods until payment is actually made, and on the other hand, the buyer does not need to give up his money until the goods are actually given into his possession. If the parties so agree the buyer may also inspect the goods before parting with his money, but in the absence of agreement to this effect, it is the custom of the express companies to refuse to allow such inspection.

79. **When title passes—Delivery to carrier.**—The question as to when title passes in such sales is one on which the courts are divided; some taking the view that title passes when the goods are delivered to the carrier, while others hold that no title passes until the actual delivery of the goods to the buyer. The first view is the one usually considered to be the better view. It is based on the idea that there is nothing different in such a case from the ordinary question of passing of title when goods are delivered to the carrier by the seller in response to an order

from the buyer. If the parties intend in the ordinary case that title shall pass on delivery to the carrier there would seem to be nothing in the added duty which the carrier has assumed of collecting and remitting the purchase price, which indicates a different intention. The Sales Act[70] has adopted this view after stating the presumption that title passes in the ordinary case where goods are given to the carrier for transportation. It says: "This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents." Courts holding the first view say that the carrier has merely taken the obligations of a collecting agent in addition to its usual duties of transportation.

If title passes when goods are delivered to the express company, then the buyer may pass a good title to an innocent purchaser, if he can secure possession, whether he has made payment or not. If A in response to B's order sends a buggy to B, "C. O. D.," and B secures possession without making payment, and sells it to C, an innocent purchaser, B, having a good title, therefore passed a good title to C and C can hold the goods as against A and is not required to pay A the purchase price or give up the goods to him.[71] A's only remedy in such case would be to look to B for the price, or hold the carrier liable for having improperly delivered the goods.

[70] § 19, rule 4 (2).

[71] Norfolk South. Rr. Co. v. Barnes, 104 N. C. 25, LEADING ILLUSTRATIVE CASES.

80. **Same subject—Payment of the price.**—The courts holding the second view maintain that by shipping the goods "C.O.D." the seller does not mean merely to retain a hold on them to secure payment, but that it is not the intention of the parties that title shall pass until actual payment of the price is made. This is treating the case much as if it were a sale over the counter, or a sale conditioned to become effective only on payment of cash. The argument against this is that in employing the carrier to collect the price there is nothing to show that the seller has not intended title to pass, and that it would be presumed to have passed except for the C. O. D. provision, and that this alone does not negative that presumption but merely amounts to a retention by the seller of the possession, much in the nature of a vendor's lien for securing payment of the price.

In most of the cases which have maintained this view, the subject matter of the sale was intoxicating liquors or other articles, the sale of which was prohibited within the jurisdiction and which were sent into the state under C. O. D. shipment. The policy of the state being against such goods, the tendency undoubtedly in many cases has been to treat title as passing where the payment is made, in order to be able to declare such sales as made within the state and therefore illegal. The apparent influence of prohibitory legislation upon the decisions in such cases tends to weaken their authority upon the simple question of whether title passes in C. O. D. sales at the place of shipment, or at the place of delivery to the buyer.

A good example of the line of cases holding the second view is State v. John O'Neil.[72] Here the action was a criminal prosecution for a violation of the liquor laws of the State of Vermont in selling liquor within the state. A in Vermont ordered liquor from B in New York, which was sent C. O. D. It was held that the parties did not intend any passing of title until the goods were delivered and paid for and that the express company was the agent of the seller, so that its possession was the possession of the seller and hence title did not pass until the goods were paid for by the buyer, and that therefore the laws of the state had been violated by the sale and passing of title to liquor within the state.

[72] 58 Vt. 140, LEADING ILLUSTRATIVE CASES.

CHAPTER XII.

FRAUD AND ITS EFFECT.

81. **Effect on title.**—The essential thing in the question of the passing of title is whether the parties intended that it should pass, and not what induced them to have this intention. Therefore if A really intended to pass title of certain property to B, B will get the title though he has been guilty of the grossest misrepresentation and fraud in bringing about the contract and inducing A to have this intention. Such conduct on B's part may place certain obligations and duties upon him, when he gets the title in this manner, and so also anyone who takes it from him without paying value for it, or with knowledge of the facts, may be bound in the same way, but it cannot be said that the title has not passed.

82. **Contract voidable.**—One who has thus been induced by fraud to part with his title is not without remedy, for not only may he hold the wrongdoer in damages because of the fraud and deceit, but he may also rescind the contract and recover back the property.[73] It seems that, in order to effect such rescission, nothing further is necessary than that the seller should demand back the property from the buyer, and upon his failure or refusal to deliver it, the seller may bring replevin and regain posses-

[73] Barnard v. Campbell, 58 N. Y. 73, LEADING ILLUSTRATIVE CASES.

sion of it. But until the seller has signified his intention to rescind, and thus revest himself with title, the property is in the buyer and if the goods were destroyed the loss would be upon him. The minds of the parties have met upon the subject matter of the contract and title has passed; rescission is merely allowing the seller to get it back, because he was trapped into parting with it in the first place. The right to rescind in such a case is given to the seller by the law, and the law allows him to get back the title merely by his own act, and without any formal action or aid of the law. He may also get back possession if he can, but if he cannot, the law will lend him its aid in doing so.

83. **Contract void.**—If the nature of the fraud was such as to prevent the meeting of the minds of the parties then in such a case there will be no passing of title at all, for intention to pass title is absolutely necessary, and is effective for that purpose, no matter how induced, but any fraud which operates to prevent the formation of the contract or the meeting of the minds of the parties, will absolutely prevent the title from passing.[74] If A should fraudulently represent to B that he was the agent of C and as such induce B to ship goods, no title would pass in such case, for here the fraud has operated so that there is in fact no intention to pass title. B intended to pass title to C, and did not intend to pass title to A, therefore since no contract was in fact made with C because A did not really represent him,

[74] Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805, LEADING ILLUSTRATIVE CASES.

there is no passing of title to C; on the other hand B never intended to pass title to A and did not purport to do so. The character of the fraud, therefore, was such as to prevent the actual passing of title to anyone and B therefore still has title to the goods.[75] But if A should represent to B that he is a man of good credit when in fact he is insolvent, and therefore B should sell goods to A, the title in such case would pass, for the parties so intend, even though it was fraudulent representation which made the seller have such intention. Title in such case is in the buyer until the seller does some act to show that he rescinds the sale.

84. **Election to hold fraudulent buyer.**—Since the title has actually passed, if the parties so intended, regardless of the fraud practiced by the buyer, the seller may treat the contract as binding if he so wishes or he may rescind the contract and take the title back. But since the title has actually passed the sale will stand until the seller signifies his intention to rescind, and this he must do within a reasonable time after the discovery of the fraud practiced upon him. The vendor may also by his conduct show that he ratifies the contract, as by suing for the price or taking security for its payment after learning of the buyer's fraudulent conduct.

85. **What constitutes fraud.**—"Fraud is a false representation of facts, made with a knowledge of its falsehood, or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him

[75] Brunswick & Co. v. U. S. Express Co., 46 Iowa 677.

to act upon it."[76] It does not need to be by spoken or written words, but may consist of acts or conduct on the part of one party tending to mislead the other. Sometimes a nod of the head or shrug of the shoulders may be more expressive than any spoken words. The fraudulent representations, no matter how made, must be with reference to something materially connected with the sale, so as to have, to some degree at least, induced the defrauded party to enter into the bargain.

Ordinarily mere silence will not amount to a fraud, for the parties are said to be dealing at arm's length, and there is no duty on the part of one party to give information to the other with reference to the value of the article which is the subject matter of their contract. Some courts, however, hold that if the seller knows that the article is materially defective and knows also that the buyer is laboring under an erroneous impression with reference to the property so that he would not buy if he knew the facts, then failure to disclose the truth under such circumstances will in itself amount to a fraud. It is also generally considered as fraudulent for one to purchase property with the intention of not paying for the same; but some courts do not consider that this amounts to fraud unless the buyer is in fact insolvent, so that he knows that he will not be able to pay. This is perhaps really in the nature of a concealment which in fact amounts to fraud, for the one thing which the seller has in mind is to get payment for his goods, and the very fact of purchasing is a

[76] Anson, Contracts (7th ed.), p. 165.

representation on the part of the buyer that he intends to pay. But mere lack of ability to make payment, or mere insolvency at the time of the purchase, is not enough to make the bargain fraudulent. There must be shown either an actual intent to defraud the seller by securing goods without making payment for them, or facts of such a character that such intent may be presumed.

86. **Rights of innocent purchaser.**—One who purchases goods from a fraudulent buyer, paying full value but purchasing without notice, gets the title which his vendor had, but since he had no knowledge of the fraud he assumes no duty with reference to the property and therefore may hold it as against the original defrauded seller. If he knew of the fraud when purchasing then he would hold in exactly the same position as the one who directly committed the fraud, and the original seller could recover the property from him. He would take it with the same rights and obligations which the defrauding party had.

The reason why the innocent purchaser is protected is because he actually gets the full title from the defrauding party, and though the defrauding party could always be compelled to return the property when the one defrauded rescinds the sale because of the obligations and duties placed upon him by the law by reason of his fraud, still these obligations and duties cannot be thrust upon one who has purchased innocently. He holds the property free and clear, and the only remedy of the defrauded party is to go against the one who defrauded him.

87. **Retention of possession as fraud on creditors.** —After passing title, if the seller still retains the goods in his possession, there is great opportunity for the commission of fraud upon the creditors of the vendor or of the vendee and upon innocent purchasers of the goods. Here there is no fraud as between the buyer and the seller, and so the sale is binding as to them and neither can, on his own action, rescind it. But in so far as they have attempted to defraud the creditors of one party or the other, such creditors, by showing the fraud, may compel the rescission of the sale and the application of the property to their claims. Since it would be so easy for a party to defraud his creditors who are likely to seize his goods, by pretending a sale when in fact none had been actually made, the law has considered it evidence of fraud when a sale has been made but the possession of the goods is still left with the vendor. That is, most states would put the burden upon the vendor in such a case of showing that no fraud was intended by the retention of possession, and require that he explain the purpose of so retaining the goods if the title has really passed. If this were not the case it would be an easy matter for one in financial difficulties to find some friend who would take or pretend to take title to the goods, leaving the other party in the full possession and enjoyment of them, with an agreement that if the property should be seized by the creditors of the "seller," the pretended purchaser should claim the goods as his, thus defeating the creditors, and later, after the immediate danger had passed, return the

goods to the true owner, thus accomplishing a fraud most difficult to detect.

It is necessary that both parties should have intended a fraud upon creditors in order that such sale may be set aside as to them, for if either party acted honestly, since the sale is good as between the parties in any case, such honest party, not being a party to any fraud, can hold the goods as against the creditors of the other, even though the other may have intended a fraud. The fraud in such cases must be a fraud entered into by both the buyer and seller as against such third parties.

88. **Same subject.**—There is also opportunity to thus defraud the creditors of the buyer so that, though an actual sale of the goods was intended, the buyer may keep such property out of the reach of his creditors, by agreeing with the vendor that he shall claim the goods as his own if they are sought to be held by the creditors of the buyer. This arrangement being between the two parties, the actual situation may be entirely unknown to anyone else so that any statements which they may make with reference to the property might be impossible to disprove.

By retaining possession after the sale, the vendor also has the opportunity to defraud innocent persons who may attempt to purchase these goods from the original owner, being deceived by his continued possession into supposing that the title is still in him. Though there is here another possibility of fraud, it is not as strong a case as are the others which have been mentioned.

The various possibilities of committing fraud which are opened when the seller retains possession of the goods, have led many states to enact statutes to protect the rights of third persons. Such statutes have, as a rule, given protection not only to creditors but also to innocent purchasers of the goods, usually declaring that as to such parties the sale shall be void, though allowing the sale to be good as between the parties to it, if the rights of innocent parties are not affected. The Sales Act[77] does not declare the mere retention of possession to constitute fraud, as has been held in some states and adopted by statute in others, but is so stated that the local rule, whatever it is, may be applied. It merely states that when the "retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void."

89. **Possession as evidence of title.**—Ordinarily the mere possession of goods is no evidence of title, and one who purchases from another has no reason to believe that he is the owner rather than a mere bailee because of such possession. Therefore, the true owner cannot ordinarily be estopped from setting up his title and claiming the goods in the hands of any purchaser from the bailee, however innocent the purchaser may be. But if, after a sale has been made, the goods are not delivered to the buyer but are left in the seller's possession, many states have held, without the aid of statutory provision, that the innocent purchaser should be protected,

[77] § 26.

thus making a distinction between cases where a person has given up possession to another and a third person has been deceived thereby, and cases where, though a buyer of goods has received title as between himself and his vendor, the goods have been left in the possession of the vendor. Here if the one having possession wrongfully sells them to an innocent purchaser, such purchaser will be protected. This must be based upon the principle of estoppel, for it is clear that the seller has already parted with the title to the first buyer, for delivery is not necessary in order to pass title. If the seller has actually parted with the title he cannot have any title to pass to the new innocent purchaser. Therefore, if such purchaser is to be protected it is because the seller by his conduct has so made it possible for the innocent party to be deceived that the true owner should be estopped from setting up the actual situation as to his title and ownership in the property.

90. **Same subject.**—The only reason why the true owner should be estopped from setting up his right in this case, while he is not so estopped in the case of a mere bailment of his goods, must be because the purchaser was entitled to rely upon the continued possession by the former owner as evidence that he still holds the goods as he originally did, if there is nothing to give notice of any change in the true owner's relationship to them. To say that the buyer gets title as against his vendor, but that the vendor still has the title to pass to anyone else, does not seem satisfactory. That the true owner may be

estopped to set up his title so that an innocent second purchaser may get the goods is understandable, but not all cases clearly show the essential elements of true estoppel. That is, for a good case of estoppel, it should appear that the second purchaser had knowledge, or reason to believe, that the goods had once been the property of the seller and has therefore purchased in reliance upon that fact, and not merely in reliance upon the present possession which he sees to be in the seller, for that would also cover cases of mere bailment, where this is never so held. But statutes protecting the second purchaser from the original owner who still retains possession, have been so common, and so many of the cases have been decided under such statutes, that it is now difficult to determine the true basis of the decisions. But this much is clear, that the American courts in general have preferred the second purchaser from the vendor in possession, over the first purchaser, and that therefore at the present time, even in the absence of statute on the matter, a buyer must receive delivery of the property in order to be sure that he will get the goods against the claim of a subsequent purchaser.

CHAPTER XIII.

SELLER'S REMEDIES.

91. Goods in buyer's possession.—If the goods have been given into the buyer's possession without fraud on the buyer's part, the seller cannot recover the goods from the buyer, even though he refuses or is unable to pay for them. The goods are now the property of the buyer as much as any other goods which he may own and the seller has no greater claim on the particular goods which he has sold to the buyer than has any other creditor of the buyer. There is a plain and simple debt due the seller no different from the claim of anyone else to whom the buyer is indebted, and he must proceed to collect as any other creditor, and the goods sold are now a part of the general assets of the buyer and are available alike to any of his creditors. The seller's only remedy, therefore, is to bring an action for the price of the goods as agreed upon by the parties and proceed as for a debt contracted in any other way. If fraud has been practiced on the seller which induced him to part with the goods, he may rescind the sale, as has already been explained,[78] and recover back the goods so long as they have not passed into the hands of an innocent purchaser who has paid value for them. But if the seller has suffered any damage by the fraud of the buyer which induced the sale, the

[78] See Chap. XII, § 82.

seller should, of course, also have an action to recover against the fraudulent party for the injury.

92. **Goods in seller's possession.**—When the goods are retained in the seller's possession he has a lien thereon as has been shown in a previous chapter,[79] and there are three remedies open to him. The situation of the seller was stated by Earl, C., in Dustan v. McAndrew,[80] as follows: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own, and recover the difference between the market price, at the time and place of delivery, and the contract price."

93. **Where title has not passed—Damages.**—If there is a valid contract to sell but the title has not yet passed and the buyer fails or refuses to take the goods, there are various remedies open to the seller, not all of which, however, are admitted by all courts.

The seller's most obvious remedy in such a case is an action for damages for the breach of the contract. This is not different in principle or application from any other contract action. The measure of damages to which the seller is entitled upon the

[79] Chap. VIII.
[80] 44 N. Y. 72.

buyer's default is the difference between the price which the buyer was to pay and the value of the goods at the time and place set for performance. This will put the seller as nearly as possible in the same position as if the contract had actually been performed, which should always be the basis upon which damages are assessed by the court.

If, however, the contract price and the market price are the same, or if the market price is higher than the contract price, the seller may still recover nominal damages, for, though the seller has suffered no actual damage, nevertheless the buyer is in default by failing to perform the contract, and the court will give nominal damages, that is, such a small sum as one cent or one dollar, merely to show that the buyer is in default. Thus, the buyer's failure or refusal to take the goods may actually result in a benefit to the seller, if the price of such goods has materially advanced, yet the seller is, nevertheless, entitled to nominal damages, since the buyer is technically in default in not carrying out his agreement.

94. **Agreement to pay regardless of passing of title.**—The buyer may agree that upon the doing of certain acts by the seller he will become bound to pay him a certain sum of money, and this without regard to the question of whether or not title is to pass. If in such a case the seller performs as agreed, he is entitled to the money, it being understood that when the money has been paid, then the title is to be in the buyer, for it would not be fair to allow the recovery of the sum agreed upon as

the full price of the goods, and still leave the seller with the goods also. In White v. Solomon[81] the buyer agreed to pay thirty-five dollars upon the delivery of a manikin at the express office, and it was assumed in the case that title was not to pass by such delivery only. The court said, "The buyer has said in terms that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. * * * If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum."

Such decisions as this have been often misunderstood and misinterpreted so that they have been taken as standing for the doctrine that even though the title has not passed, nevertheless the seller might bring action for the purchase price. Some courts do take such a view, as is stated in a later section,[82] but the two principles are distinct and separate and should not be confused.

The Sales Act[83] states clearly the law that the payment of the price may be due by the terms of the contract, even though the title has not yet passed, as follows: "Where, under a contract to

[81] 164 Mass. 516.
[82] § 97.
[83] § 63 (2).

sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

95. **Goods to be made to order.**—Most courts have held that when the seller has made goods according to a special order given by the buyer, so that they would not ordinarily be salable on the market or would have no market value, in such case the seller may tender the goods to the buyer, and if he refuses to accept or receive them, store them for the buyer and bring action against him for the full price.[84] The result in such a case is to force the title upon the buyer against his will. The effect in this case is not unfair, for, since the goods have been made to the buyer's order and to fit his peculiar ideas, they will, in all probability, be worth more to him than to anyone else. In fact, if the goods are very unusual it may be very difficult to estimate with accuracy and with fairness to both parties the exact damages which should be given. The goods may have no market value because of the peculiar way in which they are made. Therefore, it is not unjust to make the buyer take them, since the probability is that they are worth more to him than to anyone else, and to make him pay the seller the full price which he has contracted for.

If the goods are made in a very peculiar manner

[84] Bement v. Smith, 15 Wend. 493 (N. Y.), LEADING ILLUSTRATIVE CASES.

to fit the ideas of the buyer, damages given would be estimated as in any other case, i. e., the difference between the contract price and the market value, but the market value may be little or nothing, since the goods are made to fit the peculiar notions of a particular person. The result is that damages will amount to practically the whole purchase price, and this has undoubtedly induced the courts to say that it would come more nearly to accomplishing justice under such circumstances to make the buyer pay the remainder of the price and take the goods which ought to be worth more to him than to anyone else.

96. **Same subject—Specific performance—Work and labor.**—The practical outcome of this relief is to compel specific performance of the contract at law, since the result is that the buyer is compelled to pay the full price and is virtually forced to take title to the goods, a relief which is regularly given only in a court of equity. The courts of law do not call it by this name, however, but the result accomplished is certainly much the same.

Some courts have also been influenced, undoubtedly, by the tendency to class such contracts as contracts for work and labor[85] rather than as contracts of sale. Here again, if they allow a recovery for work and labor and materials furnished at the order of the buyer, it is not going very much further and is, perhaps, accomplishing a more just result to allow an action for the full contract price and then give the goods to the one at whose instance the work and labor was furnished, to let him dis-

[85] See Chap. XIX, §§ 143-147.

pose of them as he pleases or make the best use of them which he can.

97. **Contracts for ordinary goods.**—It is not a very great extension of the result worked out in the two previous sections, i. e., where goods have been made specially to order, to apply the rule generally, rather than to limit it to any special class of goods. And this seems to have been done by some courts, with the result that even though title has not yet passed, the seller may tender the goods to the buyer and recover the whole purchase price, thus forcing the buyer to take title. Not all courts have gone this far, for to apply the rule to goods of an ordinary character overlooks the principle upon which relief was first granted, where the goods were made specially to order.

By this rule, the buyer who is in default cannot, by his own act, prevent the title from passing to him and is thus made to assume all the duties and liabilities of a purchaser of property. To allow the seller to recover the full price and force the buyer to take the property, rather than to limit the seller to the more usual remedy of an action for the damages suffered because the buyer has not taken the title, seems most unusual and is hard to work out on any theory consistent with the operation of a court of law in other cases.

However, many of the cases containing statements to the effect that the seller may recover the full contract price even though the title has not passed, will be found to be cases where, by the terms of the bargain, payment was to be due regardless

of the passing of title, cases of goods made to special order, or cases where the bargain was so interpreted that the seller was allowed by the previous assent of the buyer to appropriate goods to the contract and thus pass title before giving up possession.

The Sales Act[86] has adopted a rule which is more in the nature of a compromise, rather than a definite statement of the law adopted in actual decisions. It provides: "Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, * * * the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price." Where this statement of the law is adopted the result will be to allow recovery of the price in many cases where goods are apt to be the sort that "cannot readily be resold for a reasonable price," but without limiting it to this class, leaving it a question for proof in each case whether the goods can "readily be resold for a reasonable price," whether they have been specially made to order or not.

98. **Obligation to tender the goods.**—In whatever form the doctrine has been allowed by the courts, whether in the more limited application to cases of goods made to order or in the much broader form applying to goods of any character, this

[86] § 63 (3).

remedy, i. e., action for full price, is available to the seller only when he has made an actual tender of the goods to the buyer, unless the buyer's conduct is such as to excuse him from an actual tender. When such tender of the goods has been made and refused, the seller must then store the goods with some third person or retain them in his own possession with notice to the buyer that they are at his disposal. It would seem that such act of the seller either in storing or giving notice must be the moment of time when the title to the goods passes, or if the seller retains possession without giving notice, then the time when he brings action for the price will mark the moment of the passing of title.

Here, as in the case of rescission of a sale where the result is that the seller is allowed to take the title back without the buyer's consent, the law courts seem to have adopted a short cut, much different in form and effect from the remedy by way of damages which is usually given, and without forcing the parties to go into a court of equity, have allowed a form of relief, which permits the innocent party at his own election to compel the party in default to perform his obligation and as nearly as possible remedy the effect of his wrongful act. The right of a defrauded party to rescind the contract and revest himself with title, has been universally recognized by the courts of law, and this newer right allowed the seller by many courts, by his own act to vest the title in the buyer who wrongfully refuses to receive it, seems not an unreasonable extension of the same principle.

CHAPTER XIV.

BUYER'S REMEDIES.

99. **Action for damages.**—When the seller fails or refuses to transfer the title to the goods to the buyer, or if, though the title has in fact passed, the seller fails to deliver the goods to the buyer, the buyer may bring action against the seller to recover any damages which he may have suffered thereby.

If there has merely been a contract to sell, which contract the seller has broken, the buyer's measure of damages for the non-delivery "where there is an available market for the goods in question, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."[87]

When the title to the goods has actually passed, if the seller refuses to perform the contract and deliver over the goods, the buyer may also bring action for the damage suffered, and such damage will be estimated in practically the same way as when no title passed. But since the title has passed, the buyer must owe the full purchase price for the goods; and if through the fault of the seller he is

[87] Sales Act, § 67 (3).

deprived of the goods he should recover their full value measured at the time and place agreed upon for delivery. The result will be that if the buyer has not yet paid the purchase price this will be deducted from the amount to be recovered as the value of the goods, making the measure of damage just the same as where no title had passed. Nor is the case different ordinarily if the full purchase price has been paid, for the value at the time and place of delivery will include the purchase price plus any increase in value which the goods would have if they had been delivered according to the terms of the agreement. If the goods have declined in value the buyer will be allowed to recover the money which he has actually paid.

100. **Purchase price paid.**—In one situation, however, a different right of damage than that above stated has been allowed to the buyer, and that is where the buyer has paid the purchase price for the goods before receiving them. Here there have been two different rules applied to determine the buyer's right of recovery. Since the buyer has parted with his money, he may not be in financial condition to purchase other goods to replace those which the seller has failed or refused to deliver, and hence it is unfair to him to allow the seller by his wrongful act to retain the goods and secure any rise in value which may come about after the date set for delivery. The possibility of this increase in value is in many cases the buyer's only reason for purchasing the goods, and if he intends to resell, is his only chance of profit. Should the buyer then be allowed

to recover only the value at the time set for delivery, or at the time his action is brought, or should he be allowed to recover the most that he might have made by selling the goods when the market was the highest? Most courts have allowed the buyer only the value at the time and place of delivery, together with interest on this amount up to the time of the recovery against the seller, this interest being considered as compensation for the delay.

Some courts have adopted the rule of "highest intermediate value" as fixing the measure of the buyer's recovery, i. e., they allow the buyer's damage to be measured by the difference between the contract price and the highest value which the goods have attained at any time between the date set for delivery and the bringing of the buyer's action. This rule is very hard upon the seller, and even though he is in the wrong he ought not to be treated unjustly. It practically assumes that the buyer would have had such business skill and judgment that he would have held the goods until, and sold when, the highest point in the market was reached. Such a measure of damages gives too great an advantage to the buyer, who is practically much better off, in such a case, because the agreement was not performed than if it had in fact been carried out.

Still another measure of recovery allowed by some courts is the difference between the purchase price and the price when the action is brought. As stated, however, perhaps the majority of courts favor the rule which really gives the buyer the same measure of damage when the price has been paid as he would

have had if it had not been paid, but with the addition of interest, as a compensation for the delay, on the full value of the goods at the date of the breach of the contract. The Sales Act[88] does not adopt any of the various rules which have been worked out in different jurisdictions, but leaves it open for each state to apply the rule there in force, merely providing that "the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld."

101. **Rescission for failure or refusal to perform.**—The buyer may also rescind the sale if the seller has failed or refused to transfer the title to him, and thus cast all the risks of ownership back upon the seller, and recover from the seller any money which he may have paid him. It really amounts to forcing title back upon the seller when the buyer brings action for the conversion of his goods, for the buyer asks to recover from the seller the full value of the goods, and since the buyer cannot have both the goods and the money which represents their full value, if the seller is compelled to pay the money sum adjudged as the value of the goods, the title thereto will again vest in the seller.

102. **Recovery of money paid when title fails or goods are non-existent.**—If the seller cannot give a good title to the buyer, he cannot keep the money which the buyer has paid him, for it must be the understanding of the parties that the money was paid for the passing of title to the goods to the

[88] § 66.

buyer. Unless it clearly so appears, it cannot be supposed that the buyer gave his money for the mere chance that the seller could give him title, or that he gave it for whatever title the seller might have and could give, taking his chances as to whether the seller had a defective title or any title at all. So also if the goods are destroyed after the purchase money has been paid, but before the title was actually passed to the buyer, or if, unknown to the parties, the goods are not in existence at the time when they meant to pass title, then the buyer may recover back any money paid. The loss is thrown upon the one who owned the title at the time the loss occurred, for the buyer has paid his money for property and did not intend to bargain merely for a chance, unless such was the clear understanding of the parties.

103. **Replevin for the goods.**—If the title to the goods has actually passed, but the seller refuses to give the goods over to the buyer who is in no way in default, the buyer is entitled to the goods themselves if he desires them and is not compelled to look only to damages or the recovery back of his purchase money. By the action of replevin he may secure the goods themselves just as can any person whose goods are wrongfully detained and held in the possession of another. If the buyer has paid for the goods, or if he has purchased them on credit, which credit has not yet expired, and the buyer is not insolvent, he is entitled to the actual possession of the goods and may, through the legal proceeding of replevin, secure them.

104. **Can buyer force the seller to sell?**—While some courts allow the seller to force the title upon the buyer, though he does not wish to take the goods,[89] the buyer has not generally been allowed a corresponding right to make the seller sell and transfer the title against his will, except in cases where the property is of such a special and peculiar nature or is of peculiar value to the purchaser, so as to make it properly the subject for the equitable remedy of specific performance.[90] The reason of this distinction is, perhaps, to be found in the fact that the buyer is not in need of such protection, in that he may usually be able to get goods of the same kind elsewhere at the regular market price and will be easily and fully compensated by being allowed to recover in damages for the seller's breach of contract. It is ordinarily much easier to buy for ready money than it is to make a fair sale for ready money. The seller has his money tied up in the goods, while ordinarily the buyer still has his money and may easily secure the goods from others. But it must be borne in mind that the idea of allowing the seller to force the title upon the buyer is a most unusual doctrine, not followed by most courts except in the cases of goods made specially to order, and hence it is not surprising that the courts should limit its application rather than extend it to all possible cases.

The Sales Act,[91] in providing for specific performance, does not give any new rights to the buyer but

[89] See Chap. XIII, § 97.

[90] See subject, EQUITABLE RIGHTS AND REMEDIES.

[91] § 68.

merely states the rights which the buyer would have in a court of equity under special circumstances: "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages."

105. **Inspection and warranty.**—The special rights which are allowed to the buyer with reference to the inspection of goods[92] that are offered in fulfillment of the contract, and his rights upon breach of warranty[93] in the sale of goods, will be discussed in separate chapters.

[92] See Chap. XV.
[93] See Chap. XVIII.

CHAPTER XV.

BUYER'S RIGHT OF INSPECTION.

106. **Nature of the right.**—One who has bargained for goods, whether buying specific goods or goods purchased by description and to be selected by the seller, is entitled to see what he is getting. He need not take the seller's word for it but he has a right to look at the goods themselves to see that they are in fact the goods bargained for, or if merely looking at them will reveal nothing, then to make such tests as are reasonably necessary to determine the facts. Should the seller refuse to permit a reasonable inspection, he cannot then hold the buyer to the bargain or recover damages from him.

107. **When title is to pass—On delivery to buyer.**—If the bargain calls for delivery to the buyer, he has the right to inspect the goods before title shall actually pass to him, or, as it is usually stated, the right of inspection is a condition precedent to the passing of title. The seller has not carried out his part of the bargain so as to pass the title, merely by delivering to the buyer, for title will not pass until the buyer accepts, and before accepting or before he can be in default for not accepting he has the right to inspect the goods to see that they are the goods contracted for. Therefore, if the seller refuses to allow inspection he cannot hold the buyer

on the contract or collect from him the purchase price, since the seller is himself in default and has failed to perform that which was a condition precedent to the passing of title. The Sales Act[94] states the generally accepted view, that the right of inspection is in the nature of a condition precedent to the passing of title under ordinary circumstances: "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

108. **Same subject—On delivery to carrier.**—Even though, by the usual rule of sales, the title has passed to the buyer upon the delivery of the goods to the carrier to be transported to the buyer, yet this does not deprive the buyer of his right of inspection, but merely changes the manner in which he is to exercise his rights. It may be that the buyer would have had the right to demand inspection before the goods were taken on board by the carrier for transportation, but his failure to exercise his right at this time does not deprive him of his remedies, for when the goods have been delivered to the buyer he has the right, not only to inspect but after he has made inspection if he finds that the goods do not correspond to the description or are not the specific goods ordered, to throw the goods back upon the seller; and he will secure a perfect defense to any action for the purchase price which may be brought

[94] § 47 (1).

against him, or will have the right to recover back the purchase price if he has already paid the same to the seller.

Inspection would be a worthless right in the large class of cases where goods are ordered from a distance, if the buyer's right was limited only to inspection before title passes, since it would be practically impossible in most cases for him to make inspection before the goods are delivered to the carrier. The rule as given in the Sales Act[95] states the rights of the buyer in this regard as they have been fixed by the decisions, allowing opportunity for inspection before it can be considered that the buyer has accepted the goods as complying with the contract: "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

109. **When and where inspection should be made.** —If the goods are to be actually delivered to the buyer, then the time and place for inspection are upon his receipt of the goods, precedent to his acceptance of the same. But if title has passed before the buyer has had opportunity to inspect, then inspection should be made within a reasonable time after they arrive and are in a situation where inspection is possible.[96] But in either case, if merely looking at the goods will reveal nothing, then the buyer, even

[95] § 47 (1).

[96] Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, LEADING ILLUSTRATIVE CASES.

though he takes the goods into his possession, still has the right to make such tests and examination of the goods as are reasonable and necessary in order to reveal their nature and character.

110. **Use or test of goods.**—When it is necessary to use or test the goods, this does not prevent title from passing until such inspection as here required has been made, but title will pass as in the case of goods delivered to the carrier, subject to rescission on the part of the buyer if the goods turn out not to be of the kind called for by the contract. Where the goods are of such a nature that they can only be tested by actual use, then the time given to the buyer to determine their character must extend until such reasonable time as the goods would ordinarily get into the hands of the buyer's customers and until he has opportunity to receive objections made by them. But if the character of the goods can be determined by making certain tests of the goods, the buyer should make such tests if he wishes to make use of the right given him upon inspection, and a failure to do so will show that he has waived the right which the law has here given him. If the goods are not as they should be, any portion used in making the tests cannot be charged up to the buyer, since the seller is the one at fault, and the buyer had the right to make such inspection. However, any other expense incurred by the buyer in making tests must be borne by the buyer, for he is not bound to make them and can be considered as doing it only for his own satisfaction. What is "reasonable opportunity for examination," and

what acts may be proper in making examination, will depend upon the nature and character of the goods which are the subject matter of the contract.

111. **What constitutes acceptance.**—The Sales Act[97] has clearly stated the law as to what constitutes acceptance, as follows: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." It has been held that, after the buyer has decided to reject the goods, if he then uses any portion of them in making a test, this act is inconsistent with ownership in the seller and binds the buyer to keep the goods.[98]

112. **Inspection compared with breach of warranty.**—As a condition precedent to the passing of title, the right of inspection is clearly a separate and distinct right given by the law of sales to the buyer for his protection. But where title has already passed, what is spoken of as the right of inspection, in such cases, has reference only to the question of the remedies which may be given to the buyer when the seller has not complied with the terms of the contract. It will be observed that the buyer's right is to have a complete defense to an action by the seller for the purchase price, or if

[97] § 48.

[98] Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, LEADING ILLUSTRATIVE CASES.

such price has already been paid, to recover it back. Both these remedies really amount to allowing the buyer to rescind, and the effect of the right of inspection is to allow the buyer a reasonable opportunity to determine whether the goods are as bargained for and to give him the right to rescind and pass the title back to the seller if they are not. This result is the same as where rescission is allowed for breach of warranty. In states where the doctrine of rescission for breach of warranty is not recognized, these special rights given to the buyer after title has passed, under the name of "Inspection," are of great importance, as they secure to him a very complete and satisfactory remedy which he would not otherwise have.

CHAPTER XVI.

IMPLIED WARRANTIES.

113. **Rule of caveat emptor.**—In general the rule of the common law as developed in England and in this country is "caveat emptor," let the buyer beware, that is, in the sale of goods the buyer must understand that he takes the risk as to the quality of the goods which he is purchasing. The rule of the common law differs very materially in this respect from that which has been adopted in the civil law now in force in most of Europe, since there it is held that "a sound price implies a sound article." Originally the common law applied the rule of caveat emptor with the greatest strictness, to the extent of holding that, in the absence of a warranty expressly stated on the part of the seller, the buyer took all risks, not only as to quality, but also as to title. In so far as the law has recognized any implied warranties, whether of title or of quality, they may be regarded as operating as limitations upon the strict rule of caveat emptor as originally recognized by the common law.

114. **Warranty of title—Limitation on rule of caveat emptor.**—The idea that the seller, merely by offering to sell goods, impliedly warrants that he has the right and power to do so and therefore that he has a good title and will pass such title to the purchaser, is now generally recognized in our law, and

is therefore a limitation upon the idea that the buyer must beware and must take the risk that the seller is not really the owner of what he is selling.[99]

115. **Same subject—Goods in seller's possession.**—That a person who has the actual possession of goods and offers to sell them, thereby warrants that he will give good title, is now everywhere recognized. It is so reasonable to infer that this is what he intends and what the buyer has every reason to believe that he intends, that it seems odd that any other rule should ever have prevailed. Since the vital and fundamental thing in the law of sales is the passing of title, every idea of honesty would dictate that in offering to sell, the seller means that he has something to sell, that he has title and can pass it, since the buyer's whole object in purchasing is to get the goods as his own, that is, get title to them. Therefore we now understand that the mere offer to sell goods which are in the seller's possession amounts to a warranty that he has the title to the goods and will pass it to the buyer. In other words, he impliedly warrants that he will give the buyer a good title.

116. **Same subject—Goods not in seller's possession.**—Though it has often been stated that no such warranty was implied if the seller was not in possession of the goods at the time the sale was made, the decisions which actually so hold are few in number, though the statement has been made by way of dictum in many cases. Upon principle there seems no good reason why the seller should not be held to

[99] Gould v. Bourgeois, 51 N. J. L. 361, LEADING ILLUSTRATIVE CASES.

give an implied warranty of title as much when not having possession as when the goods are actually handed over by him to the buyer. The actual risk which the buyer runs that the seller does not really have title may possibly be a little greater when the seller does not have possession of the goods, but from the standpoint of what the seller is offering to give in consideration of receiving the buyer's money, it is hard to see that he can honestly be intending or offering to do any less here than where he has the possession of the goods and there seems no reason why the buyer should be led to believe that he is here to get less for his money. The buyer wants to become the owner in one case as much as in the other, and certainly the seller, unless he actually has a fraudulent intent, must be considered as offering the title unless he expressly limits his bargain.

The English cases have made no distinction depending upon the possession, and the tendency of the later American decisions is the same way, and this is perhaps the present weight of actual authority on the subject. This tendency is also recognized in the Sales Act,[1] which makes no distinction in implied warranty of title dependent upon the seller's possession. It is there provided that: "In a contract to sell or a sale, unless a contrary intention appears, there is an implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass."

[1] § 13 (1).

117. **Same subject—Effect of buyer's knowledge.**—Of course, the seller may always cut down this implied warranty by express limitation. So also if the buyer knows that the seller does not have a good title, he cannot rely upon the seller's conduct or offer of sale as being an implied warranty of title. Thus if the seller sells goods as an unredeemed pledge, it cannot be supposed that he warrants the title to the buyer, for he has made known the special capacity in which he sells and so he clearly does not purport to have the title and cannot therefore be said to warrant it to the buyer. But the mere fact that goods are second-hand goods, or that the seller is a dealer in second-hand goods, does not in any way cut down the usual warranty, for one may have a good title to goods of this kind, and the mere fact of selling them as his own implies a warranty on the part of the seller that he has the title. But if the seller purports to sell, not the entire property right in the goods, but only such title as he himself may have, he thus takes away the warranty which would ordinarily be implied.

118. **Same subject—Applied to liens, encumbrances, etc.**—The warranty of title which is inferred in the ordinary sale of goods, implies that the seller has not only some title, but that he has the full and complete title to the goods, entirely free and clear from all claims or rights of others. If there is any claim by way of lien, or mortgage, or other encumbrance upon the goods this constitutes a breach of the implied warranty of title. The Sales Act[2] states

[2] § 13 (2).

the general rule, that there is "an implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or shown to the buyer before or at the time when the contract or sale is made."

119. **Same subject—Fraud of seller.**—Not only is the seller liable for breach of the implied warranty if he does not have a full and clear title to the goods which are the subject of the sale, but he may also be held liable for his fraud if he sells goods knowing that he does not have title, or that his title is defective.

120. **Implied warranty of merchantability—Caveat emptor.**—In general, with reference to the quality, the doctrine of caveat emptor applies, and the buyer must beware as to the quality of the goods which he is purchasing, since the payment of a fair price does not imply that a sound article will be given in return. But the doctrine of caveat emptor, with reference to the quality of the goods, is limited by the requirement that they should be merchantable of their kind, and within the limits of this principle the buyer does not take the risk as to their quality.[3] In the situations in which the warranty properly applies it protects the buyer to this extent: that the goods must at least be of fair quality so as generally to be considered salable as goods of the kind and description contracted for. It is not a warranty which can be very strictly defined, but it does

[3] Wilson v. Lawrence, 139 Mass. 318, 1 N. E. 278, LEADING ILLUSTRATIVE CASES.

not entitle the buyer, on the one hand, to goods of the best quality or of any particular degree of fineness, but, on the other hand, it does protect him from goods having any unusual or remarkable defects.

121. **Same subject—Goods not subject to inspection.**—When the sale concerns goods which are not before the parties so that the buyer has no opportunity to inspect them and is, therefore, not able to discover any defects, as where the goods are ordered by description and the seller then selects goods to answer the description, a warranty that the goods so selected are merchantable of their kind is implied. Since the buyer, in such a case, is not in a position to determine the quality or character of the goods, it must be inferred that he authorized the selection of goods of merchantable quality only, and that by selecting and sending goods in compliance with the buyer's orders, the seller impliedly represents that they are of this character.

There can be no difference in this situation, whether the seller is the manufacturer of the goods or a mere dealer, for the reasoning which implies a warranty would apply as much to one situation as to the other, as in each case the buyer leaves it to the seller's judgment to select the goods which are called for by the contract.

The Sales Act[4] states the law as it has been established by the courts as follows: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an

[4] § 15 (2).

implied warranty that the goods shall be of merchantable quality."

122. **Same subject—Goods subject to inspection.** —If the goods are before the parties so as to be subject to inspection by the buyer, there may or may not be an implied warranty, dependent upon the situation of the seller. Most courts have said that if the seller in such a case is only a dealer in the goods, the seller and the buyer stand upon practically an even footing, and therefore the doctrine of caveat emptor applies. If the goods are open to inspection, then the buyer is not relying upon the seller to select, but is relying upon his own judgment, and, further, the fact that inspection would reveal nothing, that is, that the defects are latent, makes no difference, for there is usually no more opportunity for one party to know of defects than for the other, and, therefore, the usual rule, let the buyer beware, should apply, and the burden should not be thrust upon the innocent seller.

But if the seller is in fact the manufacturer or grower of the article sold, his opportunities for knowing the character of the goods and discovering any defects are ordinarily very much greater than those of the intending purchaser, and one purchasing from such a seller would have much greater reason to place reliance upon him than upon one who is only a dealer in the goods. This inequality in the situation of buyer and seller, when the goods are sold by the manufacturer or grower, seems the only reason for implying a warranty here, which is not implied if the seller is only a dealer in such goods.

But in the Sales Act,[5] the distinction made in the decisions with regard to the situation of the seller was disregarded, and anyone, whether manufacturer or dealer, is liable for latent defects in the goods. The statement of the Sales Act is: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." It is to be noticed that this statement speaks only of examination, and not of reasonable opportunity for examination. In this it also goes beyond present decisions and allows the buyer to rely upon the skill and judgment of the seller if he wishes to do so, and does not force him to assume any responsibility upon his own judgment.

123. **Same subject—Warranty of fitness for particular purpose.**—When the buyer makes known to the seller the purpose for which he wants an article and leaves it to the judgment of the seller to select it for him, the very act of making the selection is construed as an implied warranty that the article is suitable for the purpose specified.[6] The fact that the goods are unmerchantable may prevent their being suitable for the purpose for which they were intended to be used, but though the two warranties may thus often overlap, they are not one and the same, for even though the article is merchantable it still may not be fitted to the use which the buyer has stated that he intends to make of it, so that there may be a breach of one of the implied warranties without a breach of the other.

[5] § 15 (3).

[6] Randall v. Newson, 2 Q. B. Div. 102 (Eng.), LEADING ILLUSTRATIVE CASES.

The basis upon which this warranty will be implied is the reliance of the buyer upon the seller's judgment. If no specified goods are bargained for, but the selection is left to the seller, it may reasonably be said that if he knows the purpose for which the buyer wishes the goods, his act in selecting them is impliedly a representation that they are fit and suitable for that purpose, and the same implication may be made even though the goods are before the parties and hence subject to inspection, though in such a case it may be much more difficult to work out any implied warranty, for the buyer may wish these very goods and no others, using his own judgment that they will be suitable for the purpose specified. But in such a case it may be easier to show a reliance on the seller's judgment if he is the manufacturer of the goods rather than a mere dealer, so that he may be relied upon as having special or peculiar means of knowing the fitness of the goods for the use intended. But in all cases, whether the goods are specific or are sold only by description and selected by the seller, the question whether there is an implied warranty of fitness for a particular purpose will depend upon whether or not the buyer has relied on the seller's skill or judgment to furnish an article suitable for the special purpose designated.

The Sales Act,[7] in making no distinction with reference to the warranty of fitness for a particular purpose between the seller who is the manufacturer or grower and one who is merely a dealer, states

[7] § 15 (1).

the general rule; but in making any seller liable, whether a dealer in the particular goods or not, if the buyer has relied upon his judgment, it perhaps goes beyond actual present decisions, though the extension follows out the theory underlying the implied warranty in this class of cases. The Sales Act provides: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

124. **Same subject—"Known, described, and definite article."**—One thing which clearly negatives an implied warranty of fitness for a particular purpose is the buyer's request for a "known, described, and definite article." If he gets what he calls for he cannot complain because it will not fit the use for which he intended it, unless an express warranty was given. Thus, when the buyer ordered a "No. 2 size refrigerating machine" of the kind manufactured by the defendant, there was no implied warranty that that machine would cool the plaintiff's brewery to the proper temperature, even though the defendant knew the exact purpose for which the purchaser intended the machine. The buyer asked for a known, described, and definite article, and he got that for which he asked and it cannot be inferred that he meant to rely upon the seller's judgment to select a machine to accomplish the purpose for which he intended it to be used, but, rather, it

appears that he had decided for himself what sort of a machine would be adequate for his purpose, and therefore the seller's only obligation was to furnish him goods which answered the description as given.[8] Whenever any article is purchased by its trade name or number, that, almost of itself, negatives an implied warranty, and if the buyer wants a warranty in such a case as to what the article will accomplish, he should ask for an express warranty. The statement as made in the Sales Act[9] is: "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

125. **Implied warranty in sale of foods.**—With reference to the sale of articles of food a special rule has been established. Here even a dealer is held liable on an implied warranty that the foods are wholesome and fit for human consumption if he sells to one who buys for immediate consumption, and not for resale. But it seems that the rule is limited to those who are regular dealers and does not apply to sales by one other than a dealer even though he may be the grower of the article.

The rule, in so far as it goes beyond the usual implied warranties previously discussed, has generally been applied to those only who might strictly be termed dealers in provisions; and some cases, in applying this special implied warranty with reference to foods, have not even held the producer liable

[8] Seitz v. Brewers' Refrigerating, etc., Co., 141 U. S. 510, LEADING ILLUSTRATIVE CASES.

[9] § 15 (4).

unless he is also a dealer, even though he knows his products are to be used for human consumption, unless he has actual knowledge of defects. Thus, where a farmer sold diseased meat for domestic use, it was held that he was not liable on an implied warranty. The court said: "In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining at his peril the condition of the articles sold and of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for that purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser."[10]

Means of knowledge seems to be the basis of the liability even in the case of the dealer, and many cases have held that the warranty now under consideration does not apply in the purchase of canned goods for immediate consumption. "Everybody purchasing ought to be presumed to know that the retail merchant, who sells to the consumer food sealed in cans, and with which he has no connection other than as conduit between packer and consumer, has no superior means of knowing the contents of the can than the purchaser has, and in that event if the purchaser desires to protect himself he may * * * get an express warranty as to the quality of the goods."[11]

This special warranty is applied only when a sale of food is made directly for human consump-

[10] Giroux v. Stedman, 145 Mass. 439, 14 N. E. 538.
[11] Julian v. Laubenberger, 38 N. Y. S. 1052.

tion, and hence does not apply in a sale to a dealer, nor does it apply to sales of food for animals. The reason behind this implied warranty is the greater opportunity which the dealer ordinarily has to know the quality and condition of the goods in which he is dealing, and perhaps decisions were also influenced by the great danger which would result to the buyer from carelessness or negligence on the part of the seller if he were not under obligation to furnish wholesome articles.

126. **Express warranty does not preclude implied warranty.**—An express warranty does not necessarily do away with an implied warranty which would otherwise have existed, unless there is something in the express warranty inconsistent with the implied warranty or clearly showing that it was meant to be done away with. Thus, if there is an express warranty as to quality, an implied warranty upon the same subject would be considered as excluded and it would be held that the parties meant to rely on the express warranty only. But "An express warranty or condition does not negative a warranty or condition implied * * * unless inconsistent therewith."[12]

[12] Sales Act, § 15 (5).

CHAPTER XVII.

EXPRESS WARRANTIES.

127. Definition of warranty.—The definition of express warranty as stated in the Sales Act[13] represents the attitude of most American courts with reference to what statements shall be treated as warranties. The definition is: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." It is generally held that the intention of the seller in making the statement is immaterial. It is the effect which his statement might reasonably have had upon the purchaser, and which it in fact did have, which should be the material thing in determining whether the seller ought to be held to a warranty or not.

128. What constitutes a warranty—Early law.—Originally it was considered that the seller did not give a warranty when making a sale unless he expressly said that he warranted or used the word "warrant" in some way. Even though he made representations as to the character and qualities of the article sold they were not treated as binding upon him except as he might be held liable for deceit in making them, but he could not be held on

[13] § 12.

a warranty unless he expressly said that he warranted, and, in the absence of such word, the rule was "caveat emptor," and the buyer had to take all the risk as to the quality and condition of the goods.

129. **Same subject—Modern rule.**—But today we treat the statements made by the seller, whether made voluntarily or in answer to questions of the buyer, as the seller undoubtedly means them, that is, as representations which are intended by the seller as inducements to the contract, and in reliance upon which the contract is made. If the seller says that the horse he wants to sell is sound, he certainly means that the buyer should rely upon his statement in making the purchase just as much as if he had said that he warranted the horse to be sound.[14] A statement as to the quality of the article which is the subject matter of the sale certainly must have been intended by the seller to influence the buyer, and, if it might reasonably do so, and the buyer has relied upon it in making the purchase, the seller ought not to be allowed to say that the buyer should not in fact have relied upon it. With the exception of one state (Pennsylvania) all jurisdictions now consider it immaterial whether the word "warrant" is used or not. "In order to constitute a warranty it is not necessary that the word 'warrant' or 'guaranty' should be used. * * * A representation or statement of an alleged fact may amount to a warranty if it is made to appear from

[14] Chapman v. Murch, 19 Johns. 290 (N. Y.), LEADING ILLUSTRATIVE CASES.

all the circumstances that the parties intended and so understood it to have that effect."[15] Matters of description if relied upon amount to warranties. Thus, where a purchaser called for "Early strap-leaf red-top turnip seed," the seller in filling the order warranted that the seed was of that variety.[16]

130. **Warranty a contractual obligation.**—Since warranty is a matter of contract, consideration for it must be found as in any other case of contract. Ordinarily the purchase price includes the consideration for the warranty. If the seller made the representations before the bargain was closed and the buyer purchased in reliance thereon, some of the purchase price is presumed to be given for the warranty, and how much is immaterial, since there is sufficient consideration to support the contract. If the buyer has relied upon the warranty and it was an inducement to the contract, it cannot be said that part of the purchase price is not given for it. But when the seller makes the representations after the sale has actually been made, then such statements amount to nothing and the seller cannot be held liable if they are untrue unless some new and distinct consideration is now given to support this new contract which was not included in the original purchase price.

131. **Opinion of seller.**—Ordinarily a buyer ought not to place reliance upon the seller's opinion with reference to the article. He is not here stating anything as a fact with reference to the qualities or

[15] Schlichting v. Rowell, 140 Iowa 731.

[16] Wolcott, Johnson & Co. v. Lewis D. Mount, 7 Vroom 262 (N. J.), LEADING ILLUSTRATIVE CASES.

characteristics of the goods, but merely his own judgment or opinion upon a question where the buyer may also form his own opinion. But if the seller is an expert and has special knowledge or skill with reference to a particular class of articles, his statement of his opinion may have great influence in inducing the buyer to purchase, and if the seller does not correctly state his opinion he is liable, if the buyer was reasonably led to rely upon it. Statements with reference to the value of an article are ordinarily mere opinion upon which the buyer places no reliance in making the bargain. The Sales Act[17] states what is considered to be the usual situation in this respect. It says: "No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

132. **Seller's commendation.**—Much like the question of the seller's opinion is the matter of the seller's commendation of his own goods which he is offering for sale. Originally the seller was allowed to go very far in making statements as to the goods which he wished to sell without binding himself to a warranty by such statements, the reason given being that nobody believed the seller when he praised his own goods and no one relied thereon. At the present time, however, though we still recognize that some of the statements made by way of commendation are not meant as warranties, still whenever the seller's statements are so made as to matters of fact that the buyer might reasonably rely

[17] § 12.

thereon, such statements will be considered as warranties. But general expressions that the goods are "fine" or "nice" are to be treated rather as matters of opinion or as seller's praise of his wares, and are not to be relied upon as inducements to the contract.

133. **Obvious defects.**—In order to make out warranty it is necessary to show not only that the seller made representations with reference to the goods, but also that the buyer in purchasing acted in reliance thereon. Therefore, if the buyer knows of defects in the article and of the exact character and effect of such defects, he cannot be considered to have purchased in reliance upon the seller's statements or to have given any of the purchase price in consideration for the warranties. Thus, if the owner of a horse should warrant him to be sound in every way but it is perfectly apparent that the horse has only one eye and the purchaser has opportunity to observe this fact, he cannot complain of the defect after he has made the purchase. But if the exact nature and character of the defect is not apparent, then the buyer may rely upon the warranty if the defect is other or greater than it appeared on observation.[18] Thus, if a horse's eye appears sore, this may be something merely temporary which will not affect the value or usefulness of the animal, but on the other hand it may be of such a nature as to render the animal entirely worthless, or greatly reduce its value. Here, though the defect is patent, the exact nature and effect of it are

[18] Watson v. Roode, 30 Neb. 264, 46 N. W. 491, LEADING ILLUSTRATIVE CASES.

not, and the buyer cannot be said to have knowledge, and the very fact of the warranty given may be the one thing which induces him to purchase when he otherwise would not have done so because of his uncertainty as to the character of the defect.

134. **Future qualities or conditions.**—It is not necessary that the seller have knowledge concerning that which he warrants, nor is it necessary that the buyer should suppose that he has. If the seller wishes to take the risk as to future events about which he cannot have present information, there is no reason why he should not be allowed to do so just as much as he may warrant present conditions about which he may actually have no knowledge, nor is there any reason why the buyer should not be allowed to rely upon and purchase because of this warranty. The buyer may not wish to take the risk and perhaps would not purchase except for the seller's statements. A good illustration of such a warranty of future qualities or conditions is often found in the sale of young animals for breeding purposes where the qualities concerning which warranty is given cannot be determined until the maturity of the animal sold. If the seller is willing to take the risk and the buyer buys in reliance upon his so doing, the warranty is good and the seller may be held if it is broken.

135. **Sale by sample.**—When goods are sold by sample it is only another way of giving a description of the qualities which the bulk is represented to possess and such representations amount to a warranty that the bulk is like the sample; but if the

contract also describes the goods as having certain qualities and the sample does not possess these qualities it is understood that the goods are warranted to have these special qualities in addition to those of the sample. The Sales Act[19] states the law as it is understood even in the absence of statute. It provides that "In the case of a contract to sell or a sale by sample there is an implied warranty that the bulk shall correspond with the sample in quality," and it is further provided that "If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample." Though this warranty in sale by sample is here spoken of as an implied warranty, it really amounts only to another way of directly representing the qualities which the seller promises that the goods will have; it is a short way of describing the goods. But whether it is spoken of as express or implied is quite immaterial, since if it is but admitted that there is a warranty and the extent of the warranty is determined, the effect is exactly the same.[20]

[19] § 16.

[20] Bradford v. Manly, 13 Mass. 139, LEADING ILLUSTRATIVE CASES.

CHAPTER XVIII.

REMEDIES FOR BREACH OF WARRANTY.

136. **Remedies given.**—Since warranty is a matter of contract, if it is broken the buyer may recover damages therefor. The Sales Act[21] states the rule of damages as it has been fixed by the courts as follows: "The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Many courts allow a further remedy to the buyer for breach of warranty, namely, to rescind the sale upon discovering the breach and throw the goods back upon the seller because they do not comply with the contract. Not all courts allow rescission, however, and many limit the buyer only to his action for damages.

137. **Acceptance of goods as affecting damages —Seller liable.**—Courts have differed considerably in their attitude as to the effect of acceptance or retention of the goods after knowledge of a breach

[21] § 69 (6) (7).

of warranty. Since warranty is treated as contract it would seem that the action for breach thereof would remain and not be affected in any way by the buyer's mere acceptance, so that he may keep the goods and recover damages for the warranty which is broken.[22] This is the view taken by most courts and this view is adopted by the Sales Act,[23] which provides that: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale." But the Sales Act adds the qualification that "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor." This qualification is not generally stated by the courts, though it has been adopted in a few cases.

138. **Same subject—Seller not liable.**—The courts which have taken the other view, i. e., that acceptance of the goods with knowledge of their defects constituted a defense to the seller in any action for damages for breach of warranty, have generally based their decisions upon some such reasoning as this: that the seller tendered the goods in full and complete satisfaction of the contract, and that the buyer by accepting them has assented to so taking them. This view seems to offer no protection to the

[22] Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, LEADING ILLUSTRATIVE CASES.

[23] § 49.

buyer, for it may often happen that his business requires that he take the goods offered in order to supply his customers, even though he knows they are not as warranted.

It seems unnecessary to go this far to protect a seller from a pretended claim on the part of the buyer for breach of warranty when called upon for payment. True, the fact that the buyer has accepted the goods without complaint, or has made no objection to the quality until asked for payment, may be some evidence upon the question of whether the warranty was in fact broken or not, and the seller should be allowed to show this to discredit the claim that the warranty was broken, but it seems unfair to hold that the mere acceptance of the goods without any other showing should preclude the buyer from recovering on breach of warranty. The provision of the Sales Act stated in the previous section, requiring the buyer to give notice within a reasonable time that the goods are not as warranted, would seem to give the seller sufficient protection without, at the same time, being too severe on the buyer. But as previously stated, except where the Sales Act has been adopted this limitation has not been placed by many courts.

139. **Rescission for breach of warranty.**—There is a very great division of authority in this country upon the question of allowing rescission as a remedy for breach of warranty. The nature of this relief in this class of cases is that if the goods do not correspond to the warranties given, upon discovering the breach the buyer may rescind the sale, that is, throw

the title back upon the seller, thus acquiring an entire defense to any action the seller might bring for the purchase price, or if the buyer has already paid for the goods, he may bring an action to recover back this sum.

Where this right is allowed it must be exercised by the buyer as soon as he has discovered, or has had reasonable opportunity to discover, the defects, and he must also be able to put the seller back into his original position by returning the property to him in as good condition as when he received it. Should the buyer do any acts with reference to the goods, after discovering the breach of warranty, which acts evidence an intention to use them as his own, or in fact do anything inconsistent with treating them only as the seller's property, he will have waived his right to rescission. Also, if the goods are destroyed so that the seller cannot be put back into his original position, the buyer cannot then rescind, even though he can prove that the warranties given were broken, and though the loss of the goods was without any fault on his part.

The remedy of rescission for breach of warranty works out justice as between the parties, since the buyer may not want the article at any price if it does not correspond to the warranties given, and it seems most unfair to him to make him take an inferior or defective article even though he may get it for a less price. Wherever the Sales Act[24] has been adopted, rescission, as a remedy for breach of warranty, is allowed; since it provides that in such

[24] § 69 (d).

case "the buyer may, at his election * * * rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

140. **Warranty distinguished from condition.**—In jurisdictions which do not allow the buyer to rescind for breach of warranty, thus throwing goods which are defective in quality back upon the seller, but require the buyer to keep the goods and bring action for damages, the hardship of this situation has induced many courts to call matters of description conditions rather than warranties. Thus, if A should order from B certain goods by description, allowing B to select goods corresponding to the description given, courts which allow rescission for breach of warranty have generally said that if B sends goods of the kind ordered but which do not entirely comply with the description as given him, there is a breach of warranty. But if rescission is not allowed, since A would be obliged to take the goods and bring action for damages, many courts, in order to avoid this hardship, have said that it was a condition of the seller's authority to select the goods for the contract that he should select goods corresponding to the description given, and if he has in any way failed to do so, then the condition upon which he was allowed to select goods and pass title thereto has not been performed, and consequently title has never passed and the buyer is not bound by the contract. This seems unnatural and

artificial when the goods depart but slightly from the description given in the buyer's order.

But even in the jurisdictions which do not allow rescission for breach of warranty, if the title has not as yet passed, i. e., if the sale is executory, the buyer may refuse to accept the goods if they do not correspond to the agreement made by the parties with reference to them. The statement of the Sales Act[25] on this point is in accordance with the rule of practically all the American cases whether allowing rescission for breach of warranty or not. It provides: "Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell, as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods." But if the title has actually passed, many courts hold that the buyer must keep the goods and sue for breach of warranty. In the attempt to prevent title from passing, so as to thus protect the buyer, some courts have improperly termed "conditions" that which in fact would naturally be called "warranties."

141. **Warranty distinguished from non-performance of contract.**—But a clear distinction should be made as to matters which might be treated as warranties in cases in which there is an entire failure to observe the terms of the contract, as where the seller sends an article of an entirely different character from that ordered. Thus, "if a man offers

[25] § 11 (2).

to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else in their stead, it is a non-performance of it."[26] But if the parties should expressly state that the performance of certain acts or the furnishing of goods of a certain description should be a condition of the passing of title to the goods, then all courts would observe the contract which the parties had thus made,[27] and the non-performance of such condition would prevent any liability from being assumed by the buyer as much as in the case where an article of a different kind is sent. If the contract calls for an identified article, the parties mean to contract with reference to this particular thing, and this only, and the furnishing of such identified article is a condition precedent to any liability on the buyer's part. To furnish another article of the same kind and quality under the terms of such a bargain, would be as much a non-performance as if an article of an entirely different character were offered. "It would be very unfortunate if the distinction between conditions and promises should become obliterated, for the legal ideas are distinct and should have distinct names."[28]

[26] Chanter v. Hopkins, 4 M. & W. 399 (Eng.).
[27] Sales Act, § 11 (1).
[28] American Uniform Commercial Acts, p. 77.

CHAPTER XIX.

THE STATUTE OF FRAUDS.

142. **History of the Statute.**—In 1676 there was passed in England a statute[29] for the "prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury," which is commonly known as the Statute of Frauds. Its object was to prevent fraud in the proof of certain classes of contracts by requiring written evidence in order to prove the same, thus making it more difficult for anyone, by false testimony, to fix a liability upon another. The seventeenth section of this Statute referred to contracts for the sale of goods. This section was as follows: "No contract for the sale of any goods, wares, and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto authorized."

This Statute, either in its original or in some similar form, has been adopted in most of our states, and though these statutes vary in details, the general scope of them is much the same. The various

[29] 29 Car. II, c. 3.

provisions of the Statute will be discussed in the following sections.

143. **Contract of sale.**—It is important to notice that the Statute has reference not to sales so as to invalidate in any way a title which has passed, but only to contracts which look toward the actual passing of title at some future time, that is, contracts for the sale of goods.

One of the most difficult questions arising under the Statute is, What is meant by a contract of sale, i. e., does it make any difference whether the thing about which the contract is entered into is now in existence in its finished form or whether money or labor must be expended to put it into the form contemplated by the parties? There are three different views which have been worked out by various courts in reference to this problem. These views are generally spoken of as the English, the New York, and the Massachusetts rule.

144. **Same subject—English rule.**—The case of Lee v. Griffin[30] represents the present rule which is followed by the English courts. In this case a woman ordered two sets of artificial teeth to be specially made for her. After the sets of teeth were finished, but before they were fitted, the woman died, and the dentist brought action against her executor for the price. In giving the test as to whether such an agreement was for work and labor, or a contract for the sale of goods, Blackburn, J., said: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party

[30] 1 Best & Smith 272 (Eng.).

cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. * * * In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the material used in its execution." Though it is generally conceded that the English rule is the most logical and affords the most accurate test for deciding a particular case, it has not found much support in the United States; only one state, Missouri, seems to have followed it.

145. **Same subject—New York rule.**—In the case of Parsons v. Loucks,[31] there was an oral contract to manufacture and deliver a quantity of paper. In deciding that the Statute did not apply to such a case, Hunt, C., said: "The distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the Statute. * * * The latter is not. * * * The Statute alludes to a sale of goods, assuming that the articles are already in existence." This rule does not furnish a satisfactory test for a great number of cases where it may be very difficult to determine whether the article is really in existence at the time the contract is made, even though work and labor may be

[31] 48 N. Y. 17.

necessary to put it into final form as contemplated by the contract, or whether so much is still to be done that it amounts in fact to a manufacturing of goods from the materials which enter into the final product, so that the goods contracted for cannot be said to be in existence at the time of the contract. Though its application may be doubtful in a particular case, the rule of the New York cases is that the mere fact that something still remains to be done to make the goods ready for delivery will not change the case from a contract of sale to a contract for work and labor. The New York rule is followed in a number of states.

146. **Same subject—Massachusetts rule.**—The rule most generally followed in this country is that known as the Massachusetts rule, as developed in the cases of that state. In the case of Mixer v. Howarth,[32] the plaintiff had on hand the body of a carriage nearly completed, which he finished according to special directions given by the defendant. Shaw, C. J., in delivering the opinion of the court that this was not a sale as contemplated by the Statute of Frauds, said: "When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the Statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. But where it is an agreement with a workman, to put materials together and construct an article for the employer * * * it is not a sale

[32] 21 Pick. 205 (Mass.).

until an actual or constructive delivery and acceptance." The same distinction was more clearly stated by Ames, J., in Goddard v. Binney,[33] as follows: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or produces for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the Statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order and not for the general market, the case is not within the Statute."

147. **Same subject—Sales Act.**—The Massachusetts rule has had the largest following in this country and has been adopted in the Sales Act[34] in the following terms: "The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

148. **Goods, wares and merchandise.**—In general, in this country, the wording of the Statute, "goods, wares, and merchandise," has been held to be prac-

[33] 115 Mass. 450, LEADING ILLUSTRATIVE CASES.
[34] § 4 (2).

tically synonymous with the term "personal property." It has been held that the terms include choses in action, shares of stock, bonds, commercial paper, and other evidences of right, or indicia of property, though the English and some of the American jurisdictions have not always so held.

The question often arises as to whether a particular contract, for example, one for the sale of trees, crops, or minerals, is for the sale of lands, and therefore governed by the fourth section of the Statute, or whether it is controlled by the provisions of the seventeenth section under the wording "goods, wares and merchandise."

149. **Same subject—Growing crops.**—A distinction is made between crops which may be naturally produced year after year without annual cultivation and those which must be sown annually, the first called *fructus naturales* (fruits produced by nature), and the second *fructus industriales* (fruits produced by cultivation). That which is considered fructus naturales is treated as real estate and hence not within the seventeenth section of the Statute. Thus, trees, grass, certain kinds of fruits, etc., are within this description. With reference to fruits, however, it has been held by a number of courts that even though annual planting be not required, if cultivation each year is necessary to produce a crop, it should be classed as fructus industriales and hence within the seventeenth section of the Statute. Thus in Purner v. Piercy,[35] where the contract was for the sale and purchase of a crop of peaches, the defendant to

[35] 40 Md. 212; see subject, CONTRACTS.

gather and remove them as they matured, it was held that "a growing crop of peaches or other fruit, requiring periodical expense, industry and attention, in its yield and production, may be well classed as fructus industriales." The same has been held in other jurisdictions with reference to apples, blackberries, grapes and other fruit.

With reference to those things which are clearly annual crops, dependent upon annual planting and cultivation, the courts all hold such, as fructus industriales, to be personal property whether matured or not and hence within the description of "goods."

150. **Same subject—Trees; minerals.**—Growing trees are generally considered a part of the realty,[36] and hence a contract with reference thereto must comply with the provisions of the fourth section of the Statute, that relating to sales or transfers of interest in lands. But the distinction has been made by some courts between sales of timber where the immediate removal of the same is contemplated by the bargain, and sales where the timber is to derive some further benefit from the soil. Many courts have held that in the first case, this should be treated as a sale of goods and not of an interest in lands, and hence should be considered as within the seventeenth section of the Statute; but by the weight of authority in this country, it is still held to be a bargain concerning an interest in lands regardless of when the parties intend that a severance should take place. If, however, the owner of the land should bargain

[36] Hirth v. Graham, 50 Oh. St. 57, 33 N. E. 90, LEADING ILLUSTRATIVE CASES.

to cut the timber and then sell it after it is cut, this does not contemplate giving the buyer any present interest in the thing, but is a bargain to sell a thing only after it becomes a chattel, and hence cannot be considered as a contract concerning an interest in lands.

With reference to minerals, they are clearly a part of the land, and any bargain which contemplates giving a present interest therein before they are mined or leaves it to the vendee to make the severance, is an interest in realty. But, as in the case of trees, if the owner is to sever and then transfer the property to the buyer, such a bargain is one for the sale of goods and is within the seventeenth section.

151. **The Price.**—In the original Statute of Frauds, the price fixed which should bring a case within its operation was ten pounds. The sums most commonly fixed by the American statutes are either ten dollars or the substantial equivalent of the sum fixed in the English statute, i. e., fifty dollars, while others have no sum named, and still others a very large amount. In the Sales Act[37] the sum of $500 is given, thus taking the smaller transactions out of the operation of the Statute.

When no price is fixed by the parties, if the reasonable value of the goods is above the amount named in the Statute, the case is within it. And so, if the amount cannot be ascertained until a later time, where it is dependent upon quantities or qualities which are at the time unknown, the value as it

[37] § 4 (1).

actually turns out to be will determine whether or not the case is within the Statute. Where various articles are sold at the same time or where the total price to be paid exceeds the sum fixed by the Statute, the case will come within its terms.[38] When the bargain includes many separate articles each below the sum fixed by the Statute, even though a separate price is named for each, whether the case is within the Statute or not will depend upon whether the contract may fairly be considered as one entire transaction, or as so many separate and distinct bargains.

152. **Effect of Statute on the contract.**—Though the English statute said that no contract "shall be allowed to be good" unless it complied with the provisions stated, this has not been interpreted as meaning that the contract was void, but merely that it was unenforcible, and this is the interpretation generally given to this or similar expressions used in the American statutes. Some few states, however, have changed the wording so as to declare the contract void unless in compliance with the provisions of the statute. In the Sales Act[39] the usual interpretation of the English statute is clearly presented by stating that the contract "shall not be enforcible, by action." If the contract is merely unenforcible then subsequent compliance with the Statute will make it enforcible, and since it is a right existing as between the parties, whether enforcible or not, it may be made the basis of further contract between them, while if it is actually void, there will be noth-

[38] Baldey v. Parker, 2 B. & C. 37 (Eng.).
[39] § 4 (1).

ing which can be revived by subsequent action or be the subject of further agreement.

153. **Acceptance and receipt.**—The Statute requires that the "buyer shall accept part of the goods so sold, and actually receive the same" if the oral contract is to be binding. Blackburn says:[40] "It seems that this provision is not complied with unless the two things concur; the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without acceptance, so may there be an acceptance without any receipt." To prove acceptance by the buyer it must be shown that he has agreed to take the goods contracted for as being in compliance with the contract. This may be made out from his conduct by showing that he has acted with reference to the goods in a way which is inconsistent with anything other than acceptance, as by acting as if he were owner thereof or otherwise showing by his conduct that he is satisfied with the goods as fulfilling the contract.

But the mere fact of the receipt of the goods does not in any way signify an intention to accept the same. Thus, the carrier is in most cases considered as the agent of the buyer for the purpose of carrying the goods and therefore is agent to receive them; but it is not, unless specially authorized, agent to accept and the buyer may reject the goods even after they have been delivered to him. Nor is it material that the buyer has acted unreasonably in refusing the

40 Blackburn, Sales, p. 17.

goods, for the Statute simply requires that the buyer accept, and not that he ought to accept, and hence the buyer's refusal may be entirely unreasonable, yet, if he does not accept, he cannot be held on the contract unless it complies in some other way with the Statute.

If the goods are in the buyer's possession at the time of the bargain, he has already actually received the same, and nothing further is necessary to show receipt. But if the goods remain in the seller's possession or in the possession of some third person there may still be actual receipt if it can be clearly shown that the seller or his agent acting for him has given up all right to the goods as owner or seller, and has agreed to assume the position of bailee of the buyer as the new owner thereof. The provision requiring both acceptance and actual receipt has been generally followed in this country and is required by the Sales Act.[41]

154. **Earnest money or part payment.**—Another method stated in the Statute by which the contract will be made enforcible is to "give something in earnest to bind the bargain or in part of payment," and this provision is also followed in the Sales Act.[42] This requirement is another way of safeguarding the transaction so as to prevent a bargain from being established by fraud or false testimony, for the thing given in earnest or by way of part payment furnishes good evidence of the bargain. Though money is usually given "to bind the bargain," the provision of

[41] § 4 (1).
[42] § 4 (1).

the Statute does not require this, but anything may be given over as an evidence of the agreement, and its value, whether great or small, is immaterial, so long as it has some value, since its object is merely to furnish proof of the bargain. Practically, at the present time, money is always given to bind the bargain and is treated as part payment, but there seems no reason for interpreting the Statute as requiring the payment of money. But the mere deposit of money with a third person as security for the performance of the contract, to be forfeited on nonperformance, is not sufficient, for it does not come within the terms of the Statute unless such party has been made the seller's agent to receive payment for him. It must be actually given, and retained by the seller or his agent acting for him, in order to be effective so as to make the contract enforcible. The terms "something in earnest," or "in part of payment" have generally been treated as synonymous, so that whatever has been received is to be applied upon the purchase price, rather than being in addition to it.

As to what may constitute a part payment, it is generally agreed that there must be something passed between the parties, and that mere words or new agreements will not suffice. Thus a mere promise to pay, as evidenced by the buyer's own note, is not sufficient unless it is intended by the parties as absolute payment and so accepted, which is not generally the understanding of the parties; but if the note is negotiated by the seller, this clearly constitutes part payment. The giving of a check, where

there are funds to meet the same, is regarded as part payment.

The mere agreement to set off the debt due for the sale of goods against other indebtedness existing between the same parties is held not to satisfy the Statute, even though this does amount to a cancellation of the former indebtedness at law. This is merely another oral agreement and does not constitute a part payment unless some further act is done by the parties to actually cancel, then and there, the old indebtedness.

155. **The writing required.**—Another method provided by the Statute to make the contract enforcible is "that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract," and this provision is adopted in practically all statutes in almost identical terms. Further, the provision with reference to a writing has in general been repeated in the same terms in other provisions of the Statute, and hence decisions as to what constitutes a sufficient note or memorandum in other cases are applicable to cases under the seventeenth section. It should be noticed that the Statute does not require that the contract itself should be in writing but it refers specially to oral contracts and merely requires that there be "some note or memorandum thereof." The important thing therefore is to determine what will constitute a sufficient note or memorandum.

Of course there can be no question when the full contract is in writing, but much less will suffice so long as all the essential terms of the bargain are

clearly set forth. The writing should show not only the names of all the parties to the transaction, but also their position in the bargain, whether as buyer or seller, the goods which are the subject matter of the bargain and the price to be paid if this has been definitely agreed upon, together with the terms of payment.[43] Parol evidence will not be allowed to supply deficiencies in the memorandum, but the defendant may introduce evidence to show that the note or memorandum is not complete and does not set forth all the terms of the bargain. The writing may be a very informal one, not intended by the parties as evidence of the contract or for the purpose of satisfying the Statute, but this is immaterial so long as it states the essential terms of the contract so as to amount to an accurate note which will show the bargain made between the parties. Such "note or memorandum" may consist of letters, telegrams, entries in account books, etc. Nor need the note or memorandum be contained in one document alone, but it is sufficient if numerous papers are so connected physically or so refer one to another that, taken together, the whole bargain may properly be made out. Thus the envelope in which a letter was contained may be used to show the name of the party to whom it was addressed, when this name did not appear in the letter itself.

156. **Time when memorandum made.**—The writing used to prove the contract may have been made at any time before action has been brought on the contract. Thus, a written offer, containing the es-

[43] Waterman v. Meigs, 4 Cush. 497 (Mass.), LEADING ILLUSTRATIVE CASES.

sential terms of the agreement, orally accepted, is sufficient, even though when it was written there was no contract as yet made. Also the writing may be made long after the bargain, and it has been held that a letter setting forth the contract and stating that the writer did not intend to be bound thereby, could nevertheless be used. But as the Statute requires some writing in order that the contract be enforcible, such writing must exist before action is brought, and if made afterwards, will not suffice in that proceeding. "There is no actionable contract before memorandum obtained. The contract cannot be sued upon until it has been legally verified in writing; until then there is no cause of action although there is a contract. The writing is a condition precedent to the right to sue."[44]

The contract takes effect as of the date when made and not as of the date when the memorandum or other requirement has been complied with.

157. **Signature.**—In its original form, and as generally adopted, the Statute only requires that the writing be signed and does not require that it be subscribed. Therefore, the writer's name anywhere appearing, placed there by him or with his consent as his signature, constitutes a signing. But where the terms of the Statute have been changed to demand that the writing be subscribed, this can be satisfied by nothing less than having the name written under the terms of the agreement.

The form of the signature is also quite immaterial. It does not need to be written, but may be printed

[44] Bird v. Munroe, 66 Me. 337.

or stamped, or it may consist of a mark or any device which the party has adopted in the particular case as his signature. The name may be written by another, and this will suffice if adopted by the one sought to be held on the contract. And special provision is made in the Statute so as to include a signature made by a party's duly authorized agent and such signature would not need to be shown to have been later adopted or approved by the principal.

158. **The party to be charged.**—It is not necessary that the note or memorandum be signed by both parties but merely that the one who is made defendant in an action on the particular contract can be shown to have signed a sufficient note or memorandum. Thus it often happens that the contract may be enforcible on one side and not on the other, since it is only the signature of the "party sought to be charged" which is required. Even though the writing has been sent by a man to his own agent or to any third person, and was not intended by him as evidence of the contract, it may be used to prove his contract, and though he retains in his own possession such note or memorandum, it has generally been held that such writing, if proved, is sufficient to satisfy the Statute with reference to contracts concerning personal property, though it has sometimes been held that such undelivered memorandum would not suffice in case of contracts concerning land.

159. **In general with reference to the Statute.**—It is to be borne in mind that the Statute contemplates that an oral contract for the sale of personal prop-

erty is perfectly good and valid in every way, but that it places certain requirements with reference to enforcement in the courts under certain circumstances, by requiring that certain things be done, such as making part payment, or receiving and accepting the goods, or making certain writings setting forth the terms of the bargain. These provisions all refer to the enforcement of the contract in the courts, and do not in any way concern its validity, and the two things are in fact very different and should always be distinguished.

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NOTE.—The Uniform Bills of Lading Act has been adopted in Arizona, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, Alaska and Philippine Islands.

QUIZ QUESTIONS

SALES OF PERSONAL PROPERTY

(The numbers refer to the numbered sections in the text.)

1. What is meant by the Uniform Sales Act?
2. What is meant by a "sale" of personal property?
3. What is the difference between "sale" and "barter"?
4. A met B on the street and offered to sell his horse to B for $100. B paid him the $100 and immediately went to take possession of the animal. He found that the horse had been killed about an hour previously. Who must suffer the loss?

5-6. A owned a mare and sold to B all the colts which she might raise for five years. Soon after this bargain A sold the mare to C without notice of this agreement. The mare has had three colts while in C's possession during the five years. What are the rights as between B and C?

7. A, a skillful carpenter, had certain lumber, nails, etc., and the tools for cabinet work. B paid him $100 for a desk to be made from this particular lumber. As soon as the desk was finished A sold the same to C. B claims the property from C. What decision?
8. Can a person transfer any rights to property which he does not now own?
9. A owned five horses, and B paid him $200 to allow him to take his pick. B had reasonable opportunity to make a selection but had not as yet done so, when the horses were all destroyed by fire. What are the rights of the parties under the circumstances?
10. A telephoned to the grocer to send him a sack of XXXX flour. The grocer took a sack of the kind of flour specified,

marked it with A's name and set it aside for delivery. It was then stolen. Must A pay for the flour?

11. Suppose in the above case that A had come to the store and picked out this particular sack. Would this change the result?

12. A in Chicago ordered goods from B in New York, saying nothing about payment of the freight. B selected goods of the kind ordered and delivered them to the railroad company, addressed to A, saying that A would pay the freight. The goods were destroyed in a wreck. Upon whom is the loss?

13. Would it make any difference in the above case if B was to pay the freight?

14-15. A has one hundred bushels of wheat in a bin. Will it make any difference whether he sells B "ten bushels" or "one-tenth" of this grain, if the whole is destroyed before the buyer has taken his share?

16-17. A is conducting an elevator for the storage of grain. There is ten thousand bushels in the elevator, one-half of which belongs to A. B paid A $1000 for one thousand bushels, but before he took the grain, five thousand bushels of the grain stored was destroyed. What are B's rights?

18. What is meant by "fungible goods"?

20-21. A purchased from B all the hay in B's mow at ten dollars per ton, the exact quantity being unknown, the hay to be weighed on B's scales as taken away. Before any was removed the barn and its contents were destroyed. What are the rights as between A and B?

23-25. (a) A offered to purchase a certain horse of B if upon trying him for a week he proved satisfactory. A took the horse, and he was killed while in A's possession, but without his fault, before the week had expired. Upon whom is the loss?

(b) Would it make any difference in the above case if the bargain had been to purchase the horse with the privilege of returning him whenever he might prove unsatisfactory?

26. A came to B's jewelry store and asked to purchase a certain watch. The jeweler handed the watch to A, who put it in his pocket, but refused to pay the cash and went away with the watch. He later sold it to C, who paid value and

had no knowledge of A's conduct. B claimed the watch from C. Who should prevail?

27. What is meant by the phrase "conditional sale," and how does it differ from the case of a sale made on a certain condition?

28-29. What is the difference between conditional sale and chattel mortgage?

30-31. A purchased a piano from B on the following terms: He was to pay ten dollars per month until four hundred dollars was paid, and upon making the last payment was to receive the title. It was further provided that if any three payments were not made when due B might take back the piano and any payments made would be considered rent for A's use of the article. After paying three hundred dollars A failed to make the next three payments. B took the piano and refused to return the money which had been paid. What are the rights of the parties?

32. Suppose that in the above case, before any default on A's part, the property had been destroyed without his fault. Upon whom is the loss?

33. What is the reason and necessity of the statutory provisions requiring the recording of such transactions?

34. What is meant by a "bill of lading"?

35. Goods were shipped to A under a bill of lading which merely required that they be delivered to A. While the goods were still in the carrier's possession A sold the goods to B, and then later sold and transferred the bill of lading to C. B and C each claim the goods. Who has the better right and why?

36-38. Would it make any difference in the above case if the bill of lading had been made out to "A or order"?

39. Suppose that a bill of lading made to "A or bearer," is lost by A, and having been found by B is by him transferred to C, who paid value and supposed that B was properly possessed of the same. What are the rights as between A and C, in the absence of statute?

40. What would be the situation in the above case under the provisions of the Sales Act?

41. What difference, if any, in the above case if the bill of lading had been made to "A or order"?

42. In compliance with B's order A shipped goods to him, but in order to secure payment he took the bill of lading in his own name "or order." The goods were destroyed while in the hands of the carrier. Who should bear the loss, A or B?
43. A stole goods from B, shipped them, receiving a bill of lading to "A or order." He then sold the bill of lading to C, who purchased the same for value and without notice. Is B or C entitled to the goods?
44. A represented to the freight agent of a railroad company that he had left certain goods on the platform and asked to have a bill of lading for the same. The agent, relying upon his statement, issued a bill to "A or order," which A then sold to B, an innocent purchaser. In fact A had never delivered any goods to the carrier. What rights, if any, does B have by reason of this transaction?
45. A held an "order bill of lading" calling for certain goods. He induced the carrier to let him have the goods without surrendering the bill of lading. He then sold the goods to B, and later sold the bill of lading to C. Who is entitled to the goods?
47. What is meant by a vendor's lien?
48. A sold a horse to B for two hundred dollars, one hundred dollars of which was then paid and the other one hundred dollars was to be paid the next day when B came for the horse. When B offered the other one hundred dollars and demanded the horse, A refused to give him up until B also paid fifty dollars which he owed to A upon a previous transaction. This B refused to do and left without paying the one hundred dollars still due on the purchase price of the horse. B now seeks to get possession of the horse by legal process. What are his rights?
49. A sold a horse to B, but was to retain possession until payment was made. B asked A to let him take the horse to use for an hour, promising to return him to A's possession at the end of that time. A gave his permission, but as soon as B secured the horse he sold it to C, who was an innocent purchaser for value and without notice. A claims the possession of the horse from C. What decision?
50. If goods are in the buyer's possession at the time of the

sale, does the seller have a lien thereon for the purchase price?

51. A sold to B one thousand bushels of corn. After having delivered five hundred bushels to B, A refused to deliver any more unless B paid the price for the one thousand bushels. What are the rights of the parties?
52. A sold a horse to B for two hundred dollars, giving B thirty days within which to pay for the same. B called for the horse the next day, but A refused to give up possession until the price was paid. Who is entitled to the possession of the horse?
53. A purchased one thousand bushels of grain from B, but did not pay for the same. He then resold it to C, who made known to B the purchase of the goods. After delivering one hundred bushels of the grain to C, B refused to allow him to have any more until he was paid the purchase price of the goods. C seeks to recover possession from B. What decision?
54. A sold goods to B on ninety days' time. He delivered part of the goods to B, and then, discovering that B had become insolvent, refused to deliver the rest. Who is entitled to possession?
55. What is the effect upon the vendor's lien when the purchaser makes tender of the full amount due?
56. The purchaser of goods which are being held under a vendor's lien, by fraud induces the vendor to give up possession and then sells the same to a third person, who pays value but has knowledge of the fraud. What rights does such buyer secure?
57. How may the seller secure payment under his vendor's lien?
58. Define stoppage in transitu.
59. When may the right of stoppage in transitu be exercised?
60. What is necessary to prove in order to show sufficient insolvency to justify stoppage in transitu?
61. A shipped goods to B, sending him a negotiable bill of lading therefor. While the goods were in transit he learned of B's insolvency and decided to stop the goods. After A gave notice to stop, B sold the bill of lading to C, a purchaser for value. Is the stoppage effective?

62. A shipped goods to B, sending him a negotiable bill of lading covering the same. B gave this bill to a bank as security for a loan of an amount much less than the value of the goods. B became insolvent and A seeks to hold the proceeds of the bill remaining after the payment of the bank's claim. What decision?

64. Goods were shipped from point A to point C. At an intermediate station, B, the goods had to be reshipped and carried by wagon route from B to C. While stored at B awaiting such reshipment, the shipper gave notice to have the goods stopped. The buyer claims that the transit has ended. What decision?

65. A sold goods to B which B resold and shipped to C. Learning of B's insolvency A seeks to stop the goods while in the hands of the carrier. What decision?

66-68. (a) B in Chicago ordered goods from A in London, the goods to be shipped to B's agent, who would redirect them. When the goods arrived in New York B's agent redirected them to B at Chicago. A seeks to exercise his right of stoppage in transitu while the goods are in transit from New York to Chicago. What are the rights of the parties?

(b) Goods were shipped by express and the shipper, learning of the buyer's insolvency, seeks to stop the goods after they have left the possession of the railroad company and are being carried in the express company's wagon, for delivery to the buyer's residence. What decision?

69. Goods were shipped from point A to point C, but the buyer induced the railroad company to make delivery to him at an intermediate point, B. The shipper seeks to stop the goods before they could have reached point C. Has he any rights against the carrier for so delivering? Has he any rights to the goods as against the creditors of the purchaser?

70-71. What are the seller's rights in order to secure payment after he has properly exercised the right of stoppage in transitu?

72-74. After properly exercising his right of stoppage in transitu, the seller waited a reasonable time for the buyer to redeem the goods. The buyer failing to do so, the seller

then sold the goods without giving notice to the buyer of the time or place of such sale. Has the buyer any right against the seller for so doing?

75. A purchased goods from B, which B properly stopped in transit. Upon resale of the same properly made by B, he secured more than the amount due to him as the purchase price of the goods. To whom does this profit belong?

76. To what extent may the seller be considered as the agent of the buyer in making a resale of the goods after stoppage in transitu?

77. The seller had properly exercised his right of stoppage in transitu and had waited a reasonable time for the buyer to redeem the goods, but the buyer had taken no steps to do so. Later, however, finding that the seller was still in possession of the goods, the buyer tendered the price, but the seller refused to give up the goods, saying that he had decided to keep them as his own. Who is entitled to the goods?

78. What is meant when it is said that goods are shipped "C. O. D."?

79-80. The sale of liquor is by law prohibited in state X. A living in state X ordered a jug of whiskey from B living in state Y. B shipped the same to A by express "C. O. D." The express company in state X delivered the goods to A upon his paying the C. O. D. charges, which included the purchase price and the cost of transportation. The express company is accused of selling liquor within the state. Is it guilty?

81-82. By representing that he was in good financial condition when in fact he was insolvent, B induced A to sell him a certain horse on credit. B then resold the horse to C, an innocent purchaser for value and without notice of the fraud. A claims the horse from C. What decision?

83. B represented that he was the agent of C and wished to buy certain goods for him. A thereupon sold, supposing he was selling to C through B as C's agent. As soon as B received the goods he resold them to D, who purchased for value and without notice of the fraud. Upon discovering the fraud A seeks to recover the goods from D. What are the rights of the parties?

84. By fraud B induced A to sell certain goods to him, but later repented and wished to make A take the goods back. Can he compel him to do so?
85. What must be shown in order to make a contract voidable for fraud?
86. Why is the innocent purchaser of goods protected as against the original owner who was induced by fraud to sell them?
87-88. How may the retention of possession by the seller, after the title has passed, operate as fraud upon creditors of the seller? Of the buyer?
89. A loaned his horse to B. C, seeing the horse in B's possession, inquired if he owned it. Upon B representing that he did, C purchased the horse from B, who gave him the possession of the same. What are the rights of A and C?
90. A sold a horse to B but retained possession at the request of B, who feared that his creditors might seize it. The creditors of A now seize the horse in payment of A's debts, but B claims the horse from them. Who is entitled to it?
91. After the sale and delivery of goods to the buyer, does the seller have any special claim on these goods, which is different from the rights of other creditors?
92. What are the remedies of the unpaid seller who is still in possession of the goods?
93. How are the damages estimated upon the failure to perform a contract for the sale of goods?
94. A wrote to B enclosing a draft for one thousand dollars with the statement that if B would agree to send him one of the autos manufactured by B when directed to do so he might keep the money. B agreed to this and cashed the draft. Later A wrote saying he had changed his mind and demanded back his money. B offered to send A a car of the kind agreed upon but refused to return the money. What are the rights of the parties?
95-98. B wrote to A requesting him to make a carriage according to a certain design. When the carriage was finished B refused to take the same. What are A's rights?
99. How is the buyer's damage estimated when the seller refuses to perform his contract to sell?
100-101. What difference, if any, in the above case, when the purchase price of the goods has already been paid?

102. A had a horse which he had purchased from a stranger, and which he believed might turn out to be stolen property. He sold the same to B for one hundred dollars, acquainting him with all the facts. The horse had in fact been stolen from C, who reclaimed it from B. Can B recover his money back from A?

103. B purchased goods from A on credit, but when he called for the goods A refused to let him have them unless he paid the price in cash. B is perfectly solvent. What are his rights?

104-105. If A has promised to sell B certain property and then refused to do so, can B compel A to sell?

106. What is meant by a buyer's right of inspection?

107. B ordered certain goods of A to be delivered at B's residence and to be paid for in cash. The goods were boxed and B asked to open the boxes and examine the goods before paying the price. This A refused to allow and took away the goods. He now brings action against B for breach of his contract. What decision?

108-109. B ordered goods to be shipped to him by A, and when they arrived asked to inspect them before accepting. This A refused, saying that the title had already passed and that B might have inspected them before they were shipped had he so desired, and that, not having done so, his right was gone. Is the seller's contention correct?

110. Under what circumstances may the buyer use part of the goods in order to make inspection, and how much of the goods may be so used?

111. What acts on the buyer's part will show his acceptance of the goods?

113. What is meant by the expression "caveat emptor"?

114. A sold a horse to B, from whom it was taken by C, who proved that it had been stolen from him and sold and through various transfers had come into the hands of A. Has B any right against A?

115-116. Does it make any difference in the implied warranty of title whether the goods sold are in the seller's possession or not?

117. A sold to B a watch which had been left with him as a pledge but had not yet been redeemed by the owner. B

bought with knowledge of these facts. The owner of the property claims it from B. Discuss whether B has any right against A.

118-119. A left his watch with a watchmaker for repair. While so in the watchmaker's possession A sold the watch to B. When B called for the watch the watchmaker refused to give it up until paid the charges for repairing. B paid the charges and now seeks to recover this amount from A. What decision?

120. To what extent is the rule of caveat emptor limited by the implied warranty of merchantability?

121. A was a dealer in seeds. B ordered certain seeds to be shipped to him by A. The seeds were of the kind ordered but a large percentage were not fertile. Has B any right of action against A?

122. Would it make any difference in the above case if B had called at A's store and examined the seeds before purchasing?

123. What is the difference between implied warranty of merchantability and the warranty of fitness for a particular purpose?

124. B wrote to A, dealer in firearms, as follows: "The wolves have been bothering my sheep and I want a rifle to get them with. Please send me a 22 calibre Smith, Model A." A sent a rifle of the model called for but it was entirely unfit for this purpose. Is he liable to B on a breach of warranty?

125. A, a dealer in provisions, sold to B what he supposed were mushrooms. In fact they were toadstools, and by eating them B was made very sick. Has he any right of action against A?

126. A sold a horse to B, expressly warranting that he was sound. The horse was in fact sound but A's title to him was not clear. Can B recover on the implied warranty of title?

127-128. What is necessary to constitute a warranty?

129. B was bargaining with A for the purchase of a horse and asked him if the horse was gentle. A replied, "Any child can drive him." In fact the horse was of a vicious disposition. B brings action against A for breach of war-

ranty, but A claims that his statements would not constitute a warranty. What decision?

130. A sold a horse to B, at the time giving no warranty of soundness. The day after the sale B complained to A that the horse was not sound. A replied, "The horse is sound as a dollar and I warrant him to be so." The horse was in fact unsound. Can B hold A for breach of warranty?

131-132. Before selling a colt to B, A made this statement, "When that colt is four years old he will be able to do a mile in 2:20 or better." At four years old the colt was not capable of doing a mile in better than three minutes. Is the seller liable for breach of warranty?

133. A sold a horse to B which had but one eye, but gave a warranty that the horse was sound. The buyer inspected the horse and noted the defect. He later brought action against the seller for breach of the warranty of soundness because of the fact that the horse had but one eye. What decision?

134. B wrote to A saying that he wanted to buy a thoroughbred shorthorn bull to use for breeding purposes. A wrote back that he could sell him a calf of this description which when full grown would make a good animal to head his herd, but that it was now only three months old. B purchased the calf, but it turned out to be unfit for breeding purposes. Has he any right of action against the seller for breach of warranty?

135. A sent samples of cloth to B, who ordered a bolt like one of the samples. When the cloth arrived B found that it was of a poorer quality than the sample. B brought action against A for breach of warranty, but A claimed he had made no representation as to the quality of the goods. What decision?

136. What remedies are given to the buyer for breach of warranty?

137-138. B ordered from A a certain quantity of No. 1 wheat. When the wheat arrived B discovered that it would not grade as No. 1 but was of a poorer quality. He nevertheless accepted the wheat. When the seller brought action for the purchase price B asked to have set off against the

purchase price the damages for the breach of warranty. What decision?

139. What is meant by the remedy of rescission for breach of warranty?

140-141. When should the description of the goods be properly treated as a condition of the sale rather than a warranty?

142. What was the purpose of the Statute of Frauds?

143. To what class of transactions does the seventeenth section refer?

144-147. A, a miller, had certain wheat which he promised to grind up and make into flour for B. He failed to do so and B brought action against him. A set up the Statute of Frauds. But B claims that the contract was a contract for work and labor and not a contract for sale. What should be the decision?

148. Does a promissory note come within the meaning of "goods, wares, and merchandise"?

149. A sold to B a crop of potatoes then growing upon A's land, for a price less than that mentioned in the Statute of Frauds. B claimed that he was not bound by the contract because it referred to an interest in lands and should have been in writing. What decision?

150. A sold to B all the timber growing on a certain tract of land, B to have two months within which to cut and remove the same. B refused to carry out his part of the agreement, and when action was brought against him by A he set up the Statute of Frauds. What decision?

151. A agreed to sell to B a dozen chickens at one dollar each. The Statute of Frauds in their state required all contracts for the price of ten dollars or over to be in writing. Can B set up the Statute as a defense?

152. If the Statute is not complied with, what effect does it have on the contract?

153. Under an oral contract A delivered goods to B, but B without reason refused to accept the same. A brings action for the price and B sets up the Statute of Frauds. What decision?

154. A offered to sell certain goods to B and B agreed to take them if A would not require him to pay cash but would allow him to set off against the purchase price a debt which

A owed to B. Does this constitute such a part payment as to take the case out of the Statute?

155. A orally contracted to sell certain goods to B. Soon after the bargain B made a private memorandum of the agreement setting forth all its terms. Can A hold B?

156. A wrote to B offering to sell him certain goods for a definite price. B telephoned his acceptance of the offer, and no writing with reference to the bargain was afterwards made by either party. Will A's letter be a sufficient memorandum to satisfy the Statute, in an action by B against A?

157. What is the difference between "signing" and "subscribing"?

158. Under the facts as stated in question 155 above, can B hold A?

PART III

PERSONAL PROPERTY AND BAILMENTS

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ACQUISITION OF PERSONAL PROPERTY

CHAPTER I.

WHAT IS PERSONAL PROPERTY.

1. **Scope of property law.**—Much of the law relating to property is included by the common law under torts. Questions as to actions and remedies for the infringements of rights of property, and the recovery of possession or of damages from the wrongdoer, are largely treated under torts, damages, and other heads. To the law of property, however, are assigned questions as to (1) the source and origin of title, the methods of acquisition and transfer of property rights; and (2) the various

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modifications of absolute ownership, and the rights, interests, and liabilities of the respective parties when the use and possession of an object are separated from the title or ownership, as in the case of bailments.

2. **Distinction between real and personal property.**—Property is often conceived of concretely as a thing or object over which ownership is exercised; but strictly, it is the privilege or right which one has in respect to a thing or object to own, possess, use, or dispose of it to the exclusion of others. The civil law of Europe adopts a logical classification of the objects of property rights, and one existing in the nature of things, viz.: into Movables and Immovables. The common law of England also distributes the objects of property rights into two great classes, viz.: Things Real and Things Personal. In the main, the English division into real and personal is between land and goods. Land includes the soil, and those objects which are growing upon it, or annexed to the soil in such a way as to be deemed a part of it, such as grass, trees, minerals, fences, and buildings.

Whether things that are attached to the soil are chattels or not must often depend upon circumstances, and this is considered elsewhere under the head of Fixtures.

Every kind of property that is not real is personal; such are cattle, jewels, money, claims, and privileges. A thing once movable may be affixed to the soil and incorporated with it so as to become subject to the law of real property, e. g., bricks, mortar, and build-

ing stone built into a house. By severance from the soil, trees, coal, jewels, minerals, metals, oil, and gas become personal property.

Real property, as commonly understood, includes all rights and interests in respect to land, except leaseholds and liens. Leases of land for a term of years, though they be for a term of a thousand years, are classed with personal property as Chattels Real; so, liens upon land resulting from mortgages are personal property.

Vegetable growths. Vegetable growths and products have been classified as *fructus naturales* and *fructus industriales.* Fructus naturales are those which grow spontaneously, such as trees, bushes, and grasses, which are regarded as part of the land. Fructus industriales are those which are the result of annual planting, labor, and cultivation, such as grains, vegetables, and other annual crops which are regarded as personalty.[1]

As a matter of fact, the authorities are not in harmony on the question whether oranges, peaches, and other orchard fruit growing upon trees are realty or personalty. Such fruit is not the result of annual planting, but because the crop is picked annually, and labor is usually required, it is often classed with fructus industriales as personal property.[2]

3. **Divergence in the law of real and personal property.**—The divergence in the common law re-

[1] Williston, Sales, § 61.

[2] Simmons v. Williford, 60 Fla. 359, 53 So. Rep. 452, Ann. Cas. 1912 C., p. 735, 736, note.

lating to real and personal property is vastly wider than in the civil law between movables and immovables, for example, as to succession on death, the formalities of transfer and the remedies for the recovery thereof. This cannot be explained by any intelligible distinction in the subject matter for the most part, but only by the history of the law and the fact that the holding of land had, under the feudal system, a political object.

On the other hand, chattels, or things personal, were never the subject of feudal tenure, and the rules of law as to personal property have been largely drawn from reason and commercial convenience, which have been slow to influence the law of land,—a branch of law which still shows the scars and ancient technicalities of feudal policy. The modern and liberal law of personal property has, however, in certain respects, assimilated to itself the feudalized law of land, particularly as to the rules governing succession on the death of the owner and the administration of his estate. The law of leases for years, which are in the nature of contracts, and which are classed as personal property, has, nevertheless, grown up under the shadow of the law of real property, and has preserved to the present day many ancient technicalities.

4. **Corporeal and incorporeal property.**—Property may be corporeal or incorporeal according as the object of the right is material, tangible, and subject to possession, or intangible and abstract. Incorporeal personal property consists of certain valuable privileges such as patents or copyrights; and

of claims against persons or corporations such as debts, bonds, stock, bank deposits, et cetera, which are referred to as choses in action. Choses in action were regarded by the common law as things in possibility, recoverable by suit, and not yet reduced to possession. Where evidenced by a note, certificate of stock, or other document, the paper is a chose in possession, but the right evidenced thereby is incorporeal, a chose in action.

CHAPTER II.

TITLE BY OCCUPANCY.

5. **Modes of acquiring title.**—We may now proceed to consider the various modes in which title to personal property may be acquired and lost. Titles may be classified as being either by original or derivative acquisition. Original or independent acquisition is either (1) by occupancy, where a thing is appropriated which has no present owner, as in the case of the capture of wild animals; or (2) where the thing was owned, but the acquisition is independent, not under the former owner, as in the case of title by adverse possession; or (3) title by labor and production, as where a thing is newly created or produced by mental labor, as in the case of literary productions, or is the result of physical labor and materials, as in the case of accession and confusion.

Derivative titles. Such titles are either (1) by voluntary transfer by act of the former owner, as in the ordinary cases of gift and sale; or (2) where the title is derived from the former owner, but without his consent, as in the case of execution sale, bankruptcy or eminent domain, where title is said to be transferred by operation of law; and (3) where title is derived by succession on death of the former owner, either testate or intestate.

6. **Occupancy—Pursuit and capture of wild animals.**—Occupancy, as a source of title, is the appropriation and taking possession of those things which before belonged to no one,—such as wild animals, fishes, wild fowl and things thrown away or abandoned. Every individual has the right to pursue and take any beast, bird, fish, insect, reptile or other wild animal, except so far as he is restrained by private property in the soil or by game laws. Fish caught in a net from which they might possibly escape are, while actually confined, sufficiently captured to be property, and one stealing them is guilty of larceny.[3] However, in order to acquire title recognized by the law, substantial control or possession must be obtained; as where the animal is mortally wounded or disabled, or ensnared in a trap so that it may not escape at will; mere pursuit alone vests no title or property in animals *ferae naturae* (naturally wild). In the case of Young v. Hichens,[4] plaintiff had drawn his net partly around a school of fish, leaving a space of about six or seven fathoms between the ends of the net which he was about to enclose. At this point was stationed a boat to frighten the fish from escaping. Defendant rowed his boat up to this opening and threw his nets within plaintiff's nets, frightening the fish and preventing plaintiff from taking them, as he could otherwise have done. Plaintiff sued in an action of trespass which lies only for an interference with possession. Defendant set up the plea that the fish were not the plaintiff's fish and

[3] State v. Shaw, 67 Ohio St. 157, 65 N. E. Rep. 875, 60 L. R. A. 481, note.

[4] (1884) 6 Q. B. 606, 51 E. C. L. 606 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 17.

that he was not in possession of them. The court held for the defendant, although the plaintiff would have got possession but for the defendant's interference. The court intimated that the plaintiff might have succeeded if he had sued in the proper "form" or theory of action as for a wrongful and malicious interference with his business and his right to acquire property. In the case of Keeble v. Hickeringill,[5] Lord Holt sustained an action of trespass on the case for damages for frightening away ducks which plaintiff had decoyed to his pond and was about to shoot; but the action of trespass lies only for an injury to possession and plaintiff was not disturbed in his possession, but only in his chance to take possession.

Another illustration of the rule that mere pursuit gives no title until the pursuer has gained actual power over the quarry is the case of Buster v. Newkirk.[6] In that case, plaintiff had wounded a deer. He pursued the deer with his dogs until night, occasionally discovering blood. As night came on he abandoned pursuit, but the next morning resumed the chase until he came to defendant's house, where the deer had been killed the evening before by the defendant while the plaintiff's dogs were still in pursuit. One of the plaintiff's dogs laid hold of the deer at the same moment that defendant cut its throat after it had fallen exhausted. Plaintiff sued defendant in an action of trover for the value of the deer, but it was held for defendant, as the deer was

[5] (1706) 11 Q. B., East 574, note (Eng.).

[6] 20 Johns. 75 (N. Y.), 1 Gray, Cases on Property (2nd ed.), p. 19.

not sufficiently in the power or control of plaintiff to give him a property in the animal. Possibly fresh pursuit with reasonable prospect of success would give the pursuer at least a prior right to acquire property in the animal.[7]

7. **Title defeasible by escape.**—Wild animals killed belong absolutely to the killer, if he be not a trespasser.[8] In the case of wild animals confined alive, title is not absolutely vested in the captor, but is qualified or defeasible, and if they escape and are found at large in their native wildness, they are free and open to the first taker. There is a case reported where a sea-lion escaped in New York, swam down the coast of New Jersey and was captured two weeks later by a fisherman, 70 miles from the place of its escape. It was held that the animal had returned to its native state and the title was in the man who captured it, although the former owner still hoped to regain it.[9] According to Blackstone, close pursuit of a swarm of bees which flies out of one's hive is sufficient to continue a previous state of captivity, although mere pursuit vests no new title; no one else is entitled to take them so long as one keeps them in sight and has power to pursue them. Bees, rabbits, doves, or other wild animals which are so tame as habitually to return to their owner are said to have the *animus revertendi* (the intention of returning), and though they stray at large, are not regarded as having escaped.

7 Am. & Eng. Encyclopedia Law and Procedure, vol. 3, p. 956.

8 Amory v. Flyn, 10 Johns. 102 (N. Y.), 6 Am. Dec. 316.

9 Compare Mullet v. Bradley, 53 N. Y. Suppl. 781, 12 Harvard Law Review 346.

8. **Trespasser and landowner.**—Ownership of the soil imposes an important restraint upon acquiring title by occupancy, in that trespassers can acquire no property in animals killed as against the owner of the soil, who has the exclusive privilege of hunting or fishing on his land to the exclusion of all other persons and may restrain any stranger from taking wild animals upon his land.[10] If, however, the owner or possessor of the land licenses hunting or fishing, or makes no objection thereto, no one else has a better claim to wild animals taken than the first occupant. Such implied permission to trap, hunt and fish is tacitly given upon the public domain of the states and of the United States, or on private land in wild and unsettled mountain and forest regions.

It has been suggested that if a man starts game within his own grounds and follows it into another's and kills it there, he acquires title against him on whose ground it was killed, but this seems very doubtful. A closer case would arise where a trespasser starts game on another's private grounds and pursues it upon his own, as to whether his title would be vitiated or not by its inception in the trespass on the ground where the game was started.

9. **As between trespassers.**—It would seem on principle that only the landowner could question the title to game or wild animals taken on his land, but the decisions seem to be otherwise. In Rexroth v. Coon,[11] the plaintiff placed a small pine box, or bee-hive, in the crotch of a tree in the woods on the

[10] Blades v. Higgs, 11 H. L. Cas. 621 (Eng.).
[11] 15 R. I. 35, 23 Atl. Rep. 37, 5 Harvard Law Review 404.

land of G. Plaintiff visited the hive about twice a year to ascertain whether any bees had hived in the box. About September 1, some two years and a half later, defendant went on the premises and packed and carried away the hive together with the swarm of bees within it, and also the honey and honey-comb, and appropriated them to his own use. Neither the plaintiff nor defendant had any permission or license from the owner of the land to place or keep the hive in the tree, or to enter on the land for any purpose. After defendant had removed the contents, he replaced the hive in the tree. Plaintiff sues for compensation for the hive and its contents, and the question is whether he acquired any property in the bees by hiving them, notwithstanding they were on the land of another. The court held for the defendant on the ground that a trespasser on land cannot acquire title to animals *ferae naturae,* but cited authorities which discussed the question only as between a trespasser and the landowner, and not as between two trespassers.[12]

10. **Game laws.**—Property in wild animals is in the people of the state, at least so far as to be subject to governmental authority and regulation.[13] It is an interesting question whether one can acquire title to game taken or killed in violation of the game laws of the state, and whether his title is vitiated by his illegal act. In a Maine case,[14] plaintiff cap-

[12] For a note on property in bees see State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, note.

[13] Geer v. Conn., 161 U. S. 519, 40 L. Ed. 793, LEADING ILLUSTRATIVE CASES.

[14] James v. Wood, 82 Me. 173, 19 Atl. Rep. 160, 8 L. R. A. 448.

tured a moose and purchased a deer during the closed season. Defendant entered on plaintiff's land and liberated the animals. Plaintiff sues for their value, and one of the defenses set up is that his possession was unlawful and therefore he had no title even against a mere wrongdoer. It was held in the first place that defendant did not justify his act in taking the deer from the plaintiff's possession, for possession is sufficient evidence of title until impeached. Although the deer was purchased during the closed season, the evidence failed to show that it had been captured in violation of law. As to the moose, the plaintiff's illegal capture of it alive prevented the animal from becoming property at all. When game is killed, it becomes property absolutely, said the court, but when taken alive, it is only conditionally so. The possession of live game was illegal, and releasing it interfered with no legal right, and plaintiff was entitled to recover no damages for its being set loose. The court, however, fails to explain how it reconciles its decision with the principle that one cannot justify the taking of a chattel, or land, to which he has no title, by showing that the person from whom he took it is not the owner. Possession of property is a good title against everybody but the true owner.[15] Even a thief who steals a coat may sue one who takes it from him, if not the true owner.

[15] Fiske v. Small, 25 Me. 453.

CHAPTER III.

TITLE BY FINDING.

11. **Abandoned chattels.**—Chattels lost may be picked up by the finder, but it is only those things which have been actually abandoned by the former owner that are open to occupancy. In order to vest in the finder absolute right to the property, it must appear from evidence, direct or circumstantial, that the owner has voluntarily and wholly abandoned it, intending not to reclaim it.[16]

12. **Lost chattels.**—One who first finds and appropriates a lost chattel, even though not abandoned, becomes entitled to possession against all the world except the true owner. There still remains a paramount claimant, the loser, who may reclaim the property from the finder. His title remains unaffected by the mere accident that the chattel has been lost, even though sunk to the bottom of a lake or sea; as to the loser, the finder is a mere depositary or bailee, who cannot use the chattel and who must not only restore it, but often by a statute must cause it to be appraised and advertised. If the finder takes possession dishonestly and misappropriates it *animo furandi,* it is larceny.[17] Before a complete title accrues to the finder it is necessary that the true

[16] Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 97, 103.

[17] People v. Hoban, 240 Ill. 303, 88 N. E. 806, 22 L. R. A. (N. S.) 1133, note.

owner should have relinquished or lost his right to possession.

In the famous case of Armory v. Delamirie,[18] the general right of the finder of any article as against all the world except the true owner, or prior possessor, was established, and it has never since been disputed. In that case, a youthful chimney-sweep was so fortunate as to find a very valuable jewel which he took to a jeweler to ascertain its value. The jeweler attempted to take advantage of the boy and told him the stone was worthless, and offered him a few pence for it, which the lad declined and demanded the stone back again. The jeweler refused to return the stone, but gave back the socket. It was held that nobody but the real owner had a better title than the finder. Possession is nine points of the law, as a popular adage has it. The same principle applies also in the case of land, and possession is a good holding title as against all the world until a better is shown. A finder who has himself lost his find can bring trover against a second finder.[19]

13. **Finder's title as affected by ownership of the soil.**—A trespasser cannot acquire any right to possession as finder against the owner of the soil.[20] Even if one is rightfully on land of another, the owner of the place of discovery may have a superior title, particularly where the chattel is found buried in or attached to the soil. Thus where one while

[18] (1722) 1 Str. 505 (Eng.).

[19] Clark v. Maloney, (1840) 3 Harr. 68 (Del.), 1 Gray, Cases on Property (2nd ed.), p. 297.

[20] Barker v. Bates, 30 Mass. 255, 1 Gray, Cases on Property (2nd ed.), p. 295.

cleaning out a pool of water on another's land found two gold rings in the mud at the bottom of the pool, it was held that the possessor of the land was entitled to the chattels as against the finder. The landowner's general power to control, his intent to exclude unauthorized interference, carries with it a possession of everything attached to or under the land, even if as possessor he has no knowledge or intent directed to the specific thing.[21] So in another case where a prehistoric boat was discovered by the lessees of land, in the course of excavating for the foundations of a gas works, imbedded in the soil six feet below the surface, having been abandoned or left derelict by its original owners on the bank of the river some two hundred or more years before, and become by the operation of natural causes buried in the earth; it was held that the owners of the land had lawful possession good against all the world and did not lose this by the mere finding; even if the wood had not become petrified or fossilized, but retained the properties of wood, yet as a chattel it belonged to the landowner, though he was ignorant of its existence.[22] An aerolite or meteorite becomes part of the soil upon which it falls out of space and is the property of the owner of the land as against one who finds and removes it.[23]

The case of Ferguson v. Ray[24] denies that the finder has any title as against the owner of the soil to gold ore placed in a bag near marked trees and

21 South S. Water Co. v. Sharman, (1896) 2 Q. B. 44 (Eng.).
22 Elwes v. Briggs Gas Co., 33 Ch. Div. 562 (Eng.).
23 Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 728.
24 44 Ore. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, note.

found long afterward hidden in the earth. But the same court, in the case of Danielson v. Roberts,[25] held that the finders were entitled to gold coin found in rust-eaten tin cans and partially decayed sacks where they had been hidden under dirt and debris in an old hen house, even as against the owner of the soil. The distinction between these two cases is not obvious, but is explained in the later Oregon case of Roberson v. Ellis,[26] as being based on the nature of gold coin as Treasure Trove. It seems that in the case of treasure trove, which includes gold coin and gold bullion, but not gold ore, the place of finding is immaterial, and the owner of the soil in which treasure trove is found acquires no title to it by virtue of his ownership of the land.[27] It is believed that there is no basis in the common law authorities for this application of the distinction between treasure trove and other classes of lost property, and that the English common law doctrine as to treasure trove has been merged in this country into the general law respecting the finding of lost property.

14. **Property mislaid.**—If a thing is voluntarily laid down on a chair or counter and forgotten in a shop, bank, car or house, the proper custodian of chattels so mislaid is the owner of the place where the thing has been left, rather than someone who happens to have discovered it. Thus where a pocketbook was left upon a barber's table, it was held that the proprietor had a better right to possession than

[25] 44 Ore. 108, 74 Pac. 913, 65 L. R. A. 526.

[26] 58 Ore. 219, 114 Pac. 100, 35 L. R. A. (N. S.) 979.

[27] See also Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, LEADING ILLUSTRATIVE CASES.

the finder.[28] So where a pocketbook was left on a desk intended for the use of customers in a bank outside the teller's counter, the bank was held entitled to custody as against all persons except the true owner.[29] But where a pocketbook was dropped on the floor of a shop by a customer and picked up by another customer before the shopkeeper knew of it, there the property, having been dropped in a public part of the shop, was never in the possession of the shopkeeper nor under the protection of his house.[30] So where a pocketbook is found by a servant in the parlor of a hotel, the servant is entitled as against the proprietor, although it might be otherwise, if found in a private room.[31]

15. **Finding in the receptacle of another.**—By the civil law, where anything has been hidden for so long that its owner cannot be found, the title to one-half is acquired by the finder, and to the other half by the owner of the thing within which the secreted object was found; only one-half of a thing discovered and dug out of the earth belongs to the owner of the land; likewise by the civil law one-half of the thing found in a cupboard or a safe belongs to the owner of the receptacle; while by the common law one finding something in a safe belonging to another, would be entitled to keep the chattel as against the owner of the receptacle. On the other hand the owner of the soil is preferred to the actual discoverer of lost chattels except buried treasure. In

28 McAvoy v. Medina, 11 Allen 548 (Mass.), 87 Am. Dec. 733.
29 Kincaid v. Eaton, 98 Mass. 139.
30 Bridges v. Hawkesworth, 21 L. J. Q. B. 75 (Eng.).
31 Hamaker v. Blanchard, 90 Pa. 377.

Durfee v. Jones,[32] the plaintiff bought an old safe and then, wishing to sell it again, sent it to the defendant and gave him leave to keep his books in it until sold. The defendant found $165.00 in bank notes stuck in a crevice of the safe between the exterior and the lining. When this came to the plaintiff's ears, he demanded the safe and the money. Defendant sent back the safe, but refused to give up the money. Plaintiff sued, claiming that as owner of the safe, he was entitled to the money by right of prior possession. But it was held that the defendant as finder of the money was entitled to retain it as against the plaintiff, and against all the world except the real owner. The place of finding was immaterial. So where bank notes were found by an employee among some old papers, he was held entitled as against his employer.[33]

16. **Limitations on occupancy by royal privilege.** —Vacant goods casually thrown open to occupancy by loss and abandonment, if they belonged to certain classes, were vested by a special privilege at common law in the king:

(1) Such were *waifs* or stolen goods scattered or waived by a thief in his flight; here the king by substitution became the robber of the goods for which his subject, perhaps, had swung.

(2) *Wrecks,* goods or fragments of shattered vessels cast by the sea upon the shore between high and low water mark were also given by special privilege to the crown. Here there was recognized a

[32] 11 R. I. 588, 23 Am. Rep. 528.

[33] Bowen v. Sullivan, 62 Ind. 281, 30 Am. St. Rep. 172.

constructive or forced abandonment in a year and a day, provided no man, dog or cat escaped alive ashore as something to identify the property; and provided also that no owner appeared to establish claim within a year from the seizure of the property.[34]

(3) *Flotsam, jetsam and ligan,* goods adrift by some marine disaster where the owner was unknown, as well as all wreckage cast on the shore, belonged to the crown. A *derelict* in England went to the Lord of the Admiralty, who recompensed the finder by the payment of liberal salvage.

(4) *Treasure trove* is gold or silver coin, plate or bullion found concealed in the earth or in the roof, walls, or other part of a building or ruins, the owner being unknown. By early common law the finder took title against all the world except the true owner; but by statute title was vested in the king subject to the claim of the true owner. It has been noted that in the United States the common law doctrine relating to treasure trove has generally been merged into the law relating to the finding of lost property.[35]

(5) *Estrays or wandering animals* were the fifth class to which the ordinary law of finding did not extend, the law investing the privilege of the finder in the monarch, or lord to whom he granted it. The modern policy in such cases is expressed by estray statutes as to taking up animals roaming at large

[34] Murphy v. Dunham, (1889) 38 Fed. 503.

[35] Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, LEADING ILLUSTRATIVE CASES; and cases cited, 10 A. & E. Ann. Cas. 1156, 129 Am. St. Rep. 390.

without sufficient food or shelter. These usually require the finder to hold the animals on behalf of the true owner who may reclaim them within a certain time on payment of a fair remuneration to the finder for his services, but after such time, the animal may be sold.[36]

[36] Havird v. Lung, 19 Ida. 790, 115 Pac. 930; Am. & Eng. Encyclopedia Law and Procedure, vol. 3, p. 1030.

CHAPTER IV.

ACQUISITION OF TITLE BY ADVERSE POSSESSION UNDER STATUTE OF LIMITATIONS.

17. Title by adverse possession.—In certain classes of cases, title is acquired to chattels which had another owner, although title and possession are not acquired under him or by his consent. The fisherman who catches fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one in the world who can rightfully interfere with him. But a faulty possession may ripen into a full and complete legal title, and the wrongdoer will become absolute owner when the former owner's remedies are barred and there is no longer anyone who can legally dispute his possession.[37] What is the effect upon the title when A, who has stolen or converted B's property, holds adverse possession of it until the Statute of Limitations has barred B's remedy for recovering possession? Is B still the owner or entitled to retake possession without suit? It is held not. If he cannot replevy he cannot take with his own hand. The wrongdoer acquires a title superior to that of the former owner, whose neglect to avail himself of his legal remedies destroys his title.[38]

[37] Ames, Disseisin of Chattels, 3 Harvard Law Review, pp. 23, 313, 327

[38] Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209; Chapin v. Freeland 142 Mass. 383, 8 N. E. 128.

Justice of this title. Title by adverse possession apparently affords an instance of a right originating in a wrong; and yet, in reality, this doctrine is necessary to the perfection of just titles. This doctrine is intended for the repose of society, quieting title automatically by lapse of time. It is not intended to give advantage to fraud or wrong, but to avoid uncertainty in the holding of property, giving security to all proprietors and enabling purchasers to rely on title so perfected. This policy is especially important in connection with real estate under our crude system of public records where many doubts and defects concerning the title arise and the difficulty of proving title is great. In the case of personal property, possession is the usual evidence of title, and here too continued possession under claim of right is made conclusive.

18. **Requisites of adverse possession.**—The policy to be subserved indicates the requisites of title by adverse possession. A thief, merely by avoiding detection and concealing property during the period for bringing actions for conversion, cannot acquire title to the property or immunity from suit for its proceeds. Possession must be under claim of right or title, and open, public and notorious.[39] Yet, even a thief could plead the Statute if he has held the property openly and notoriously in the community where the larceny occurred; not because of his merits, nor even because of the laches of the former owner, but in order that open possession may be evi-

[39] Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119, LEADING ILLUSTRATIVE CASES.

dence of title;[40] and want of knowledge on the part of the owner does not affect the rule that the Statute begins to run as soon as the taking, if the possession is open and notorious.[41]

Possession to be deemed adverse must be under claim of title, or under color of title; otherwise there is nothing to be quieted. Mere possession, continued however long, unless it amounts to an open assertion or exercise of ownership, will not divest the owner of his property. Possession of land not under claim of title will be presumed to be in subordination to the true legal title.[42] The same rule is applied to personal property.[43]

19. **Tacking possessions.**—If A's property is converted and adversely held by B for a time and then passed from the wrongdoer B to a new possessor C by sale, may the times of the successive holders be tacked or counted together so as to make up the entire period of limitation? It is generally held in the case of land that after the Statute of Limitations has begun to run, each subsequent purchaser, even by a parol transfer, may tack on the prior adverse holding of his predecessor in order to complete the bar.[44] But if there is no privity between the adverse holders, and C takes the thing forcibly from B, it is very doubtful whether tacking would be allowed.[45] It would seem on theory, however, that there are now

[40] Shelby v. Shaner, 28 Okla. 605, 115 Pac. 785, 34 L. R. A. (N. S.) 621.
[41] Yore v. Murphy, 18 Mont. 342, 45 Pac. 217.
[42] Doherty v. Matsell, 119 N. Y. 646, 23 N. E. 994.
[43] See footnote 39, p. 22; Gatlin v. Vaut, 6 Ind. Terr. 254, 91 S. W. 38.
[44] Crawford v. Viking, etc., Co., 84 Kans. 203, 114 Pac. 240, 35 L. R. A. (N. S.) 498, note.
[45] Miller v. Dell, (C. A. 1891) 1 Gray, Cases on Property (2nd ed.), p. 39.

two defects in C's possessory title, namely, A's right to recover and also B's right as against C, and that the times of the successive adverse holders should be tacked together to make up the period of limitation as against A, even though B's right against C is not yet barred.[46] The adverse possession must, however, be continuous; for if B, after disseizing A, abandons the property, leaving possession vacant, and C subsequently finds it and assumes possession, here, in legal contemplation, A's possession revives in the meantime and C cannot tack previous holdings.

20. **Summary.**—We have thus seen that the true operation of the Statute of Limitations is not to confer title, or effect a conveyance from this or that owner. The possessor already has a title good against all intruders by his naked possession, and when the remedy of the true owner is barred, the possessory title is set free from all inconsistent or superior claims. The Statute thus operates to quiet and remove clouds from the title which the possessor already has. It in effect provides that after the open exercise of ownership for the requisite time, no one may disturb or question it.

[46] Ames, 3 Harvard Law Review, 323.

CHAPTER V.

TITLE BY SATISFACTION OF JUDGMENT FOR VALUE.

21. **Extinction of remedial right by legal proceedings.**—A possession wrongfully acquired or held may become a perfect title, legally unassailable, not only by the operation of the Statute of Limitations, but by any other method of extinction of remedial right, as by release from the true owner or by the exhaustion of legal remedy by satisfaction of judgment.

22. **Satisfaction of judgment for value.**—One wrongfully dispossessed of goods has the option of suing the wrongdoer for recovery of possession in specie by an action of replevin or detinue, or of suing the wrongdoer in trover for the value of the property converted. Where a defendant pays a judgment in trespass, trover, or other form of action, such as quasi-contract,[47] for the full value of the plaintiff's goods, the title to the goods becomes perfected in the defendant by a kind of a forced sale.[48]

Analogy to conditional sale. The question has been discussed whether satisfaction of judgment is necessary in order to vest title in the defendant, and whether title does not become vested in the defendant by the judgment alone, even without satisfaction.[49] Professor Williston suggests that in theory an

[47] Bauer v. Hess, 76 N. J. L. 257, 69 Atl. 966.
[48] Miller v. Hyde, 161 Mass. 472, 37 N. E. 760.
[49] Ames, 3 Harvard Law Review 326.

earlier time still should be recognized, as the plaintiff must have a cause of action justifying the recovery of full value at the time the action was brought, an assumption which would seem to call for the theory that the sale had been made and title had already passed to the defendant at the time the suit was filed.[50] But it may be pointed out that since the sale is one created by implication of law, it may well be regarded as conditional only, in which title and right of possession continue in the plaintiff as security until extinguished by full satisfaction and payment of the adjudged value. Thus in Miller v. Hyde,[51] the plaintiff not only took judgment in trover for a horse, but caused the horse to be attached in the action as the property of the defendant, and after judgment caused the horse to be seized in execution on the judgment as his property, and to be kept and offered for sale on execution; until, as it was about to be sold, she replevied it. The Supreme Court of Massachusetts held that her efforts to collect the value of the horse were not a final election to treat the title as transferred to the defendant. In other words, it was like a conditional sale, provisional upon completion of the levy and application of the proceeds upon her claim for damages.[52]

[50] Williston, Sales, § 570.

[51] 161 Mass. 472, 37 N. E. 760.

[52] Brinsmead v. Harrison, L. R. 6 C. P. 584, 587, 7 C. P. 547; 16 Harvard Law Review 131.

CHAPTER VI.

TITLE TO INTELLECTUAL PRODUCTS.

23. **Title to the product of labor.**—"It is generally recognized that one has a right to the fruits of his labor. This is equally true whether the work be muscular or mental or both combined. Property in literary productions, before publication and while they rest in manuscript, is as plain as property in the game of the hunter or in the grain of the husbandman."[53]

24. **Literary property at common law.**—The title to literary property is founded upon the right of an author to the results of his mental labor. At common law an author of any book or literary composition has the sole right of first printing and publishing his unpublished manuscript, and may bring an action against any person who prints, publishes or sells it without his consent. Literary property is protected, however, at common law only to the extent of the possession of the manuscript and its first publication by the owner. With voluntary publication to the world, the exclusive common law right is exhausted and the author must look alone for his future monopoly of publication to the copyright statutes. By a harsh rule of law, if he publishes his work without complying with the formalities of the

[53] Baker v. Libbie, 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 944.

copyright act, all property rights are lost.[54] Publication operates to destroy common law rights whether a copyright be secured or not, and even though failure to procure copyright may be due to mistake or purely technical defects such as failure to print a formal notice.

25. **What amounts to publication.**—Reading or delivering or communicating a product orally or to a limited circle may nevertheless permit the author to retain the incorporeal right of repetition for personal profit, without abandoning it to unlimited use by all persons, the legal result of publication in print without copyright.[55] Thus in the case of Bartlett v. Crittenden,[56] Miller as a result of twelve years' experience in teaching the art of bookkeeping prepared a manuscript denominated, "An Inductive System of Double Entry Bookkeeping" and used it several years for lectures in the classroom. He permitted his students and teachers to copy his manuscript with a view to their own advantage and to enable them to instruct others. One of the students, with certain additions from the lectures of Professor Miller, made his manuscript into a book and had it printed.

The defendant, in the suit to enjoin publication, argues that the plaintiff had abandoned and dedicated his manuscript to the public by lecturing and permitting copies to be taken. But it was held, that while at common law an author has no perpetual or

[54] Holmes v. Hurst, 174 U. S. 82, LEADING ILLUSTRATIVE CASES; Palmer v. De Witt, 47 N. Y. 532, 7 Am. St. Rep. 480.

[55] Tompkins v. Halleck, 133 Mass. 32.

[56] 5 McLean 32, Fed. Cas. No. 1076.

exclusive right in the future publication of his work, he has a property in his production until it is published to the world with his consent. Delivering lectures in the classroom does not amount to such publication; nor would it have been otherwise in case of sermons or public addresses or plays, from the oral delivery of which there is no inference of a "publication."[57]

26. **Property in letters.**—There is a dual ownership in letters, the sender having the exclusive property in the literary composition, and the receiver having property in the document merely, which he may read, sell or destroy, but the contents of which he may not publish, sell or communicate without the writer's consent. Letters thus belong as chattels to the person to whom they are addressed and delivered, but they cannot be published against the will of the writer whether they have any value as literature or not. In the case of Baker v. Libbie,[58] an auctioneer was restrained by injunction at the suit of the executor from publishing certain autograph letters of Mary Baker G. Eddy, the founder of "Christian Science," even though the letters were mere friendly letters written to a cousin, with no attribute of literature. The property rights in the writing or composition remained in the writer and her representatives and not in the receiver, although the document and the right to transfer it vested in the latter.

[57] As to what constitutes publication, see Press Pub. Co. v. Monroe, 73 Fed. 196, 51 L. R. A. 353, note, LEADING ILLUSTRATIVE CASES; also 17 Harvard Law Review 266.

[58] 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 944.

27. **Copyright statutes.**—A right to the future publication by an author of the fruits of his brain, if recognized at common law, could hardly be limited in time; it must be perpetual if it were anything extending beyond an author's lifetime. The explanation of the absence of greater recognition of the just title to literary products at common law is probably the difficulty of defining such rights, and the kind and amount of protection to be granted, which can only be defined properly by positive legislation. Statutes, therefore, confer a monopoly for a limited term of years in the sale and use of products of the mind, giving upon compliance with certain formalities of notice and registration, such limited rights as to enable the creator to reap the fruits of his labor and genius until he has received a proper reward for his efforts and outlay; and, at the same time, reconciling the creator's privilege with the interests of society so as to prevent extortion and promote human progress.[59]

28. **Good will and trademarks.**—The good will of a business, or expectation of continued public patronage, is also protected on the basis of being the result of labor and effort. "It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. If he adopts and uses a trademark (or a trade name) he has a remedy, either at law or in equity, against

[59] See Pollock, Expansion of the Common Law, p. 129.

those who undertake to use it (and divert his patronage by unfair competition) without his permission."[60] The property in trademarks and trade names used by a merchant to indicate his own productions is not in the symbol or word, but in the privilege of its exclusive use in his business.

29. **Patents.**—If a man makes a new and useful invention of any machine (or process) or composition of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it (and thus affording to all the means of ultimately availing themselves of it), obtain letters patent from the government securing to him its exclusive use and profit for a term of years.

30. **Trade secrets.**—"If a man invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for patent or not, he has not indeed an exclusive right to it against the public, nor against those who in good faith acquire a knowledge of it; but he has a property right in it, which a Court of Chancery will protect against one who in violation of contract or breach of confidence (e. g., an employee) undertakes to apply it to his own use or disclose it to third persons."[61] Manufacturers frequently refrain from patenting their secret processes and devices, preferring the exclusive use and possession that result from secrecy, even at the risk of subsequent discovery elsewhere, to dedication to free public use after a term of years which results from a patent.

[60] Gray, J., in Peabody v. Norfolk, 98 Mass. 452.
[61] Gray, J., in Peabody v. Norfolk, 98 Mass. 452.

CHAPTER VII.

TITLE BY ACCESSION.

31. **Definition and scope of accession.**—Accession relates to the acquisition or forfeiture of title to a product which is the result of the incorporation or merging of one's materials with those of another, or the result of the bestowal of labor and expense in improving the materials of another.

32. **An accession falls to the principal.**—There is a legal maxim to the effect that title to an accession or increment follows the title of the principal thing; thus if the materials of one person are united to the materials of another by labor, forming a joint product by consent of both, the owner of the principal materials will acquire the property in the whole by accession. This was a principle of the Roman law, and it has been adopted to a certain extent in the common law.[62] The maxim would seem to apply in cases of combination of materials by the consent of both owners, as where a part of the raw materials are furnished by the manufacturer of an article and part by a customer. Title to the product is in the owner who furnished the principal part of the materials.[63] So when a chattel is affixed to land, as boards, bricks and stone in a house, it becomes part

[62] See 1 Am. & Eng. Encyclopedia Law and Procedure, p. 288.
[63] Mack v. Snell, 140 N. Y. 193, 35 N. E. Rep. 493, 37 Am. St. Rep. 534.

of the land and the property of the owner of the soil, even though without the consent of the owner of the chattel. The owner of the principal thing acquires title to the accessory added. Such, too, would doubtless be the rule in the case of union of chattels without consent, where that which is wrongfully taken is insignificant in value compared with the article made from it, as in the case of a picture, a violin, or a watch spring made from materials of another.[64]

33. **True basis of title by accession.**—Upon what principle may the law give even an innocent trespasser a right or interest in another's property which he has converted and improved? The general rule is that the owner of property does not lose his title merely because the thing is misappropriated by mistake and sold or improved without his authority. But it does not follow that the owner of the materials should necessarily acquire exclusive title to the increment or accession added by the taker. As a matter of justice it would seem that neither party should lose his contribution to the accidental partnership, as where bricks are made by one from the clay of another, or hay is made from land of another, worth many times as much as the grass uncut. The natural and normal adjustment of the rights of the parties would seem to be to make them co-tenants in the final product to which each has contributed

[64] Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582, 1 Gray, Cases on Property, p. 53; Atchison, etc., Ry. Co. v. Schriver, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056. A bag filled with flour becomes a "sack of flour," and the sack of the customer is a minor accessory to the flour of the manufacturer, which is the principal thing.

material or labor, in proportion to the value of their respective contributions, at least where the improver has acted in good faith and the interests of the involuntary contributor can be protected.

34. **Co-tenancy deemed impractical.**—Co-tenancy is the rule in the analogous case of confusion or mixture of the goods of different owners where the resulting mass is easily divisible. In the case of accession, however, the final product is an independent, indivisible unit like hay or baked bricks, and one party or the other must be given exclusive possession. It has accordingly been assumed by the courts that title to the combination must be in one contributor or the other, and they have felt themselves confronted by this supposed dilemma,—that either the improver must gain title and the owner must lose his right and interest in the property, having left only a claim for the value of his materials; or else the owner must keep title to his materials with all the increments added thereto by way of accession, and the improver must lose entirely the value of his labor, since it is a general rule of law that you cannot improve a man's property without his authority and then charge him for it.[65]

35. **Innocent misappropriation.**—We shall now consider the various tests of ownership which are applied by the courts where a trespasser in good faith makes improvements upon the personal property of another—a matter upon which the authorities are not harmonious and for which no scientific or

[65]Weymouth v. C. & N. W. Ry. Co., 17 Wis. 550, 1 Gray, Cases on Property (2nd ed.), p. 54.

rational test has, as yet, been worked out by our system of law.

36. **Change of species test.**—The older common law authorities, which are still law in many states, make a change of species the controlling test. If the innocent converter sufficiently changes the nature of the materials so that they are no longer capable of identification by the senses, he is held to acquire title. Thus, it is said that if grain be made into malt, wheat into bread, or milk into cheese, it cannot be reclaimed by the owner because it cannot be known; but if cloth be made into a coat, leather into shoes, logs into boards, or iron into a tool, the identity is not gone and the materials may be reclaimed by the owner.[66]

There is confusion as to what does or does not constitute a change of species or identity;[67] and upon principle, it would seem unreasonable that a man should be deprived of the labor, time or materials which he has added to a thing mistakenly taken, or that an owner should be permitted to enjoy the fruits of another's labor rendered in good faith, without compensation, whether the species or identity be changed or not.

37. **Test of relative values.**—The more modern cases tend to discard arbitrary tests and distinctions based on mere physical alteration, and keep in view the circumstance of relative values rather than that

[66] Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

[67] Converting clay into bricks, the bricks being unburned, was held not so to change the species or identity as to transfer title; but as to the portion of the bricks burned, title was in the maker, as the identity of the clay was destroyed. Lampton v. Preston, 19 Am. Dec. 104 (Ky.).

of chemical change or mechanical transformation.[68] Thus in the leading case of Wetherbee v. Green,[69] where defendant had cut saplings on plaintiff's land in good faith relying on his supposed permission, and had by his labor turned them into barrel hoops worth twenty-eight times as much as were the saplings taken, it was held that the owner of the original materials could not reclaim the product and deprive the innocent converter of the results of all his labor; and that the title to the product had passed to the defendant who had made such a great increase in value. But in another case,[70] where timber was worked into cross ties, it was held that an increase of six-fold in value was not sufficient to bring the converter within the principle of Wetherbee v. Green.

Just what proportion of value must be added by a bona fide converter to acquire title does not seem to have been even approximately determined, other than to say that the increase should be so great as to "render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush."[71] There appears, however, to be no reason to confine this rule to cases where the enhancement is very great and the injustice of withholding title a *reductio ad absurdum;* unless possibly in case of the willful trespasser, if

[68] See Louis Werner Stave Co. v. Pickering, 119 S. W. 333 (Tex.).

[69] 22 Mich. 311, 7 Am. St. Rep. 653, 1 Gray, Cases on Property (2nd ed.), p. 62.

[70] Eaton v. Langley, (1898) 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474, Leading Illustrative Cases.

[71] Isle Royale Mining Co. v. Hertin, 37 Mich. 332, 26 Am. St. Rep. 520.

the rule of Wetherbee v. Green should be extended to him also. More delicate scales ought to be available to the innocent improver. Title to the improved article might well be conferred on the party who contributes the principal part, or greatest value of workmanship or materials, subject to a claim for reimbursement or compensation in the other contributor, and subject to a lien on the product in favor of the party whose materials are taken without his consent. Such a rule would obviate uncertain speculation as to what degree of increase is necessary, and protect both parties in all cases.

38. **Co-tenancy in joint product.**—Co-tenancy is the solution of the accession problem adopted by the German law, except in cases of transformation by work, where the person deprived is entitled to claim compensation from the taker on principles of quasi-contract. So by statute in some states in the case of union of inseparable materials, the thing so formed is given to both proprietors in proportion to their respective contributions of materials and workmanship, but neither is deprived by mere mischance of his rights in the involuntary partnership.[72]

39. **Liability of owner for compensation to improver.**—The authorities apparently refuse to recognize any quasi-contractual claim to compensation where one by mistake performs labor upon the property of another, even if substantial benefit and increase in value result. In cases of enormous increase we have seen that the improver may, according to some authorities, gain title; but save in extreme

[72] Cal. Civ. Code, § 1029; Mont. Rev. Codes, § 1414.

cases of enhancement, the unfortunate improver will lose all the result of his honest labor. This is said to be based on the policy of discouraging heedlessness and blunders.[73]

It has been suggested by an able writer that this rule seems to be inconsistent with the measure of damages for conversion and puts a premium on physical recaption by violence.[74] Professor Woodward suggests that if one who improves goods by mistake is liable in trover only to the extent of the value of the materials at the time and place of the original conversion, he ought to have an affirmative claim for compensation for the benefits conferred when the owner retakes the property itself.

The bearing of the rules as to the measure of damages in trover on the rules as to acquiring title by accession, should be observed. Where one has converted and improved another's property as a result of inadvertence or mistake, and the wrong is not intentional (even though negligent), the defendant is, by most courts, held only for the value of the materials when they were first taken, e. g., the stumpage value of trees at the time they were cut, or at most, the value of the logs immediately after their severance; and this is so even if title to the property is still in the landowner and he could retake it in specie. Upon the other hand, if the materials be appropriated by willful trespass, the trespasser is held liable for the value of the goods, however improved, and the increased value is the measure of damages.

[73] Isle Royale Mining Co. v. Hertin, 37 Mich. 332, 26 Am. St. Rep. 520.
[74] Woodward, Law of Quasi-Contracts, § 190.

This rule, or one resembling it, is generally recognized, although the courts are not unanimous.[75]

The right of the plaintiff to recover the value of improvements to converted property against a converter is supposed to be based on his right to retake the property itself, though transmuted and enhanced in value by the defendant's labor. But the right to take the improvements simply results from the fact that the plaintiff cannot get his wood, or other materials, to which he still has title, without availing himself of the accretions resulting from the defendant's labor, as a return of the goods in their condition at the time of taking cannot be had; e. g., where logs are manufactured into pulp and the plaintiff still claims the right of possession of the product manufactured from his logs. Of course, if it be assumed that the wrongdoer's improvements really belong to the original owner, the owner gets no more than compensation when their value is awarded to him in place of possession. But if the defendant, by his labor, has a qualified or imperfect right of property in the increments which he has added to the goods converted, and is justly liable only for the original materials, then he should have a quasi-contractual claim for the value of the improvements when these are appropriated by the original owner to his benefit in retaking the converted property. The substantial rights of the defendant should be the same whatever the form of remedy selected, and a premium should not be placed upon recovering

[75] Trustees v. International Paper Co., 132 Fed. 92, 18 Harvard Law Review 305, 20 Harvard Law Review 227.

the property itself, even by a breach of the peace. If it be contended that to allow a converter to recover would be to compel the owner to pay for improvements not desired by him, the answer is that he may elect in every case to let the converter keep the property and recover the damages actually suffered as the result of the conversion. So in the case of land, Professor Woodward suggests that the owner should have the election either to pay for the improvements made by mistake, or to sell the land to the improver at its fair market value.[76]

40. **Willful trespasser can acquire no title by accession.**—Where ore is mined or timber cut from the land of another in willful or wanton disregard of the owner's rights, it is a general rule that the converter will acquire no title by accession no matter how greatly he may change the species or increase the value of the materials. The original taking being dishonest and in the nature of a theft, the enhancement of value is not permitted to inure to the benefit of the wrongdoer and the owner can recover the property in its improved state, or its equivalent value, with no deduction for the labor and expense put upon it by the defendant.[77]

This doctrine was applied in the case of Silsbury v. McCoon.[78] Silsbury took corn which he knew belonged to Wood and converted it into whiskey. McCoon, one of Wood's creditors, seized the whiskey on

[76] Law of Quasi-Contracts, § 188.

[77] Woodenware Co. v. U. S., 106 U. S. 432, 1 Gray, Cases on Property (2nd ed.), p. 74; Meyers v. Gerhart et al., 54 Wash. 657, 103 Pac. 1114, LEADING ILLUSTRATIVE CASES.

[78] 3 N. Y. 359, 53 Am. Dec. 307, 1 Gray, Cases on Property (2nd ed.), p. 44.

execution as belonging to Wood. McCoon, the defendant, purchased it at the execution sale and converted it to his own use, claiming under the title of Wood. Plaintiff sues for the value of the whiskey which he had manufactured from the grain, and argues that Wood's title to the corn must be deemed extinguished by its being transformed into whiskey, a product of a different species. But it was finally held that a willful trespasser cannot acquire title to property by changing it from one species to another, upon the principle of accession. The original owner can follow his materials so long as he can trace them, even though the product be something of very different identity and value.

Bronson, Ch. J., dissented on the ground that the severe rule which permits the owner to follow and retake a new product after the property has been changed into a different species, works an injustice by going beyond the proper measure of redress, even against a willful trespasser or thief. He concludes his opinion thus: "If a man steal a piece of timber, and place it as a beam or rafter in his house; or a nail, and drive it into his ship; or paint, and put it upon his carriage, the owner cannot retake the goods, but is put to his action for damages; and this is so in the civil, as well as at the common law. If a thief take water from another's cistern, and use it in making beer; or salt, and use it in pickling pork; or fuel, and use it in smoking hams, I suppose that no one will say that the owner of the water, the salt or the fuel, may seize the beer, the pork or the hams, and there is no better reason for giving him the new

product, when sand is made into glass, malt into beer and coal into gas, or grain into whiskey. In the case now before us, the civilians would not go so far as to say that the owner of the grain might take the swine which were fattened on the refuse of the grain after it had been through the process of distillation. And yet, that would hardly be more unjust or absurd than it would be to give him the whiskey. There must be a limit somewhere."

The questionable doctrine of Silsbury v. McCoon seems generally to prevail, in spite of these counter-arguments, although it doubtless would not apply where the materials are consumed in use, as in the cases of food and fuel mentioned by Chief Justice Bronson.

Further limitations. Accession involves a joint product. Where a wrongdoer uses an instrument or tool belonging to another, the owner of the tool cannot claim the product or its value, though made with the aid of his property. Thus in a case where a corporation made an unauthorized use of stereotype plates, which it had been employed to prepare for the state, in making copies of the reports of the Nebraska Supreme Court for its own benefit, it was held that the state had no title to the books so produced by the use of its plates.[79] This was not a case of accession, as there was no joint product formed by the labor of defendants and the use of plaintiff's plates. So, if a converter should take a bear trap and set it on the public land and catch a bear therein

[79] State v. State Journal Co., 75 Neb. 275, 106 N. W. 434, 9 L. R. A. (N. S.) 174.

with his own bait, the bear would not become the property of the owner of the trap. A more doubtful case might be put where a passer-by out of curiosity should spring another's trap and the next day remove it a few yards and reset it with the same bait,—whether animals caught in the trap would belong to the converter or to the owner of the trap?

41. **Title of purchaser from willful converter.**—Even a bona-fide purchaser from a willful trespasser or converter acquires no title against the original owner, no matter how much the value may have been increased, as his vendor had none to give.[80] But in an Ohio case the court held that while the original owner has title, as against a thief, to the results of the thief's labor upon his timber, yet as against an innocent purchaser he should not recover the full value of the property in its improved state without deduction for the labor and expense put upon it. It does not comport with notions of justice and equity that against those who have done him no wrong (except a technical one) he should recover several times the value of what he has lost.[81] It would seem on true principle that even for willful conversion, where property has been increased in value by the defendant, the true measure of damages is the value at the time of conversion with interest.[82]

[80] Woodenware Co. v. United States, 106 U. S. 432; Sedgwick, Damages (9th ed.), § 504.

[81] L. S., etc., R. R. Co. v. Hutchins, 32 Ohio St. 571, 37 Ohio St. 282, 30 Am. Rep. 629. See also 18 Harvard Law Review 305.

[82] Sedgwick, Damages (9th ed.), §§ 499, 534. Compare, however, Trustees v. Internatl. Paper Co., 132 Fed. 92.

CHAPTER VIII.

TITLE BY CONFUSION.

42. **Nature of confusion.**—If similar goods of different owners become indistinguishably intermixed in a common mass so that the precise contributions of each cannot be identified, how are they to be severed? What are the rights of the different owners? Take, for example, grain or liquor or metals mixed or melted together. Does either one of the former owners acquire title to the common mass to the exclusion of the other, or do they become tenants in common of the whole in certain proportions?

43. **Where intermixture is accidental or by consent.**—Where the inter-commingling of goods is by consent, by act of a third party, or by accident of nature as in a shipwreck, the title of no one contributor is lost, although somewhat changed, each becoming a tenant in common in proportion to his respective contribution.[83]

44. **Elevator and warehouse cases.**—The most common case of lawful confusion is where A delivers his grain into a grain elevator or warehouse of B and this grain is confused with the grain of other owners. By withdrawals and deposits the entire contents of the warehouse may be changed several times before a particular depositor demands his grain. Here is a situation where not only has the

[83] Spencer v. Union Marine Ins. Co., L. R. 3 C. P. 427.

depositor's property been so confused that its identity is lost, but also the whole mass has given place to another mass of goods of the same sort.[84] At any given moment, all the holders of receipts for grain are tenants in common of the amount in store to the extent of their proportionate share.[85] The transaction may, however, amount to a sale to the warehouse man, when the goods are placed entirely at his disposal.[86]

45. **Tortious confusion by mistake.**—The intentional intermixture of one's property with that of another without his consent is a tort or legal wrong; but when done innocently, it does not necessarily cause the mixer to lose his property, provided he can show what proportion of value he has added to the mass; even if he has contributed articles of inferior quality, the owners become tenants in common and either party may take his share and make a division without resorting to the courts.[87]

46. **Willful confusion.**—If A willfully intermixes his grain or hay or timber or ore with that of B, so that it becomes impossible to distinguish what belongs to each, even here the mixer will not forfeit his contribution if the articles of the confuser are not of inferior quality, and he can show what proportion of value he has added to the mass.[88] By the better rule, he is entitled to such proportion, although some cases state that in all cases of fraudu-

84 Williston, Sales, § 154.
85 Hall v. Pillsbury, 43 Minn. 33, 44 N. W. 673.
86 Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623. See § 75.
87 Pickering v. Moore, 67 N. H. 533, 32 Atl. Rep. 828.
88 Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627.

lent intermixture where the specific contributions of the confuser cannot be distinguished or identified by him, the involuntary contributor is entitled to the whole without account.[89] Such a rule exacts not only damages, but a penalty from the wrongdoer, when to restore to the other his due proportion would do him full justice, and is out of harmony with the general rules of civil compensation or damages.

47. **Unequal values.**—Suppose inferior wine, oil, sugar, wheat, ore, timber, or gas to be dishonestly mixed with a far superior quality of the same article. The resulting mixture is of a lower average grade than the materials of the innocent, involuntary contributor, and the mixer could not be allowed to share in proportion to the relative amount, number, or weight, which he contributed, but only according to the value. The rule is laid down in many cases, however, as if it were inflexible, that the party guilty of fraudulent confusion of goods of inferior quality or value with the superior goods of another, forfeits all interest in the mass and the injured party takes the whole.[90] Thus, in the case of The Idaho,[91] the Supreme Court of the United States held that where one wrongfully mixed 25 bales of cotton belonging to himself with 140 bales of different weight and grade which belonged to another, so that the contributions could not be identified, the right of possession of the whole was in the innocent party,

[89] Ryder v. Hathaway, (1838) 21 Pick. 298 (Mass.).

[90] But query, if the mixer can show what value he has contributed.

[91] 93 U. S. 575, 23 L. Ed. 978. See also Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675, 1 Gray, Cases on Property (2nd ed.), p. 108.

and the mixer was not entitled to any bale which he could not identify as one of his lot of 25. He was not entitled to his proportionate 25 out of the 165 bales resulting from the mixture.

So in the case of Hesseltine v. Stockwell,[92] a confuser cut on his own land about 600,000 feet of pine timber, and also cut on the land of the plaintiff, Hesseltine, about 100,000 feet of timber, all of the logs being marked with the same mark and hauled to the same landing place. A residue of the mass was sold to the defendant. The plaintiff seized this which he claimed as his part of the logs, but the defendant took back the lumber out of the plaintiff's possession. Plaintiff sued in trover for the value of his interest in this part of the larger lot of 700,000 feet. The Maine court held, (1) if the commingling was accidental or by mistake as to title, plaintiff and defendant became tenants in common in due proportion, and plaintiff could recover for such proportion as the logs cut on his land bore to the whole number; but (2) if the trespass and commingling were willful and the logs were of unequal value, the whole lot of logs would become the property of plaintiff from whose land a portion of the mass was cut. (3) There would be, however, no forfeiture, even in the case of willful trespass, if the goods intermixed were of equal value.

48. **Remedies.**—The remedies of the parties whose goods are confused would seem to be as follows: In the case of innocent confusion, neither has a right to appropriate the whole mass. The inno-

[92] 30 Me. 237, 50 Am. Dec. 627.

cent party out of possession should invite the mixer to make a division, and on his refusal may take his own proportion, taking care to leave the other as nearly as possible what belongs to him. The owner of logs confused with those of a trespasser will not be liable as a wrongdoer for taking what he believes to be his share, even if he seizes more than ultimately proves to have been cut on his land, having no means of ascertaining the exact amount. He may, perhaps, take all, or at least as much as he in good faith believes to be necessary to recompense him.[93] Either contributor can recover by replevin from the possessor of the mass a quantity equal to the amount he contributed without identifying the property as his original material.[94] All possible inconvenience, however, or risk of loss from the confusion, is thrown upon him who produces it, and it is for him to distinguish his property or to show his share. Even if the goods confused were of the same kind and value, the wronged party would have the right of possession of the entire aggregate, leaving the wrongdoer to reclaim his share if he can prove his proportionate part.[95]

If confusion of goods be caused with fraudulent motive by a willful trespasser who mixes his own ore or his own logs or oil or gas with those of his innocent neighbor, and willfully neglects to keep account of the amount of the respective contributions, and

[93] Smith v. Morrill, 56 Me. 566.

[94] Rust Land Co. v. Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68. Compare Meyers v. Gerhart et al., 54 Wash. 657, 103 Pac. 1114, LEADING ILLUSTRATIVE CASES.

[95] Wright v. Ellwood Ivins Tube Co., 128 Fed. 462.

there are no means of exactly determining each one's share, a guessing method of apportionment will not be adopted, but the wrongdoer will lose his property, as all will be treated as if it were the property of the involuntary contributor until the contrary is shown.[96]

49. **Comparison of confusion and accession.**—In the case of confusion, where the result is a mass and not a single product, the contributors are treated as tenants in common of the mass where this is practicable. If the mass is capable of fair apportionment the law gives each his share, and aims to enforce no arbitrary forfeiture on the mixer, although some cases do this as against a fraudulent confuser. Unlike the rule in accession, the passive party never loses title by confusion. If the mixing was accidental, or not dishonest, each takes in proportion to his contribution; and even if willful, the better rule is the same, if the goods are of uniform quality, or those contributed by the confuser are not inferior. In the case of accession, where partition is more difficult, the common law tends to confer title on the largest contributor, leaving the other to a pecuniary claim for his contribution.

50. **Confusion by fiduciary—Tracing mingled funds into the product.**—Where an agent, collector, attorney, or trustee deposits moneys held by him as fiduciary for another, in one account with his own personal funds, to whom, in equity, does the resulting claim or credit belong? The entire credit ac-

[96] Stone v. Marshall Oil Co., 208 Penn. St. 85, 57 Atl. Rep. 183, 101 Am. St. Rep. 904, 913, note.

count does not belong to the owner of the moneys misapplied, nor to the wrongful depositor, but the parties become co-owners in the proportion which their contributions bear to the sum total. Though money be confounded in a general mass, or converted into another species of property, yet it may be followed into its product or substitute, and is a charge upon any new investment, deposit in a bank, or purchase of land or stock, to the extent of the money traceable into it. The proceeds stand in equity for the original thing so long as they can be traced or identified.[97]

51. **Deposits and withdrawals.**—Suppose that from time to time, after the confusion of a fund, the wrongdoer deposits in the bank and withdraws from the account divers amounts; can the defrauded owner still trace his money into the balance? This may become a question of the greatest importance where the assets of the insolvent confuser are being distributed in bankruptcy or insolvency by the trustee or receiver of his estate, and a defrauded owner claims a prior lien on the mass into which his funds have entered.

52. **As against the trustee.**—As between the trustee or fiduciary and the beneficial owner, where trust funds are mingled with individual funds, withdrawals will be first charged to personal funds, though the latter are received and deposited subsequent to trust funds. It is for a wrongdoer to distinguish between his own property and that of an innocent party with which he has confused it. So long as

[97] Central Nat'l Bank v. Conn. Mutual Life Ins. Co., 104 U. S. 54.

there is a balance continuously remaining on hand, this is appropriated by law to the innocent party, as presumably representing his contribution. It is otherwise expressed by saying that the charge or lien extends to the whole mass, and paying out part does not remove the charge from the remainder.[98] Proof that a trustee mingled trust funds with his own and made payments out of the confused fund is sufficient identification of the balance of the fund coming into the hands of a receiver, not exceeding the smallest amount the fund contained subsequent to the commingling. The presumption is that the trustee neither paid out the trust moneys nor invested them in other property, but kept them sacred; but if ever the balance is reduced to zero, even for a day, the claimant would have no specific or preferred claim on subsequent deposits.

53. **As against general creditors.**—The mere misapplication of trust funds or the misappropriation of other property does not create a claim in the defrauded owner superior to that of the general creditors. If, however, the checks, or cash, or their proceeds, can still be traced into any specific bank deposit, land, chattels, or securities on hand, by which the fund for distribution among the creditors of the wrongdoer is swelled or increased over what it would have been but for the misappropriation, the victim has a paramount lien or equity as co-tenant to come in ahead of general creditors in bankruptcy, as where a deposit is accepted by an insolvent bank

[98] Bank v. Peters, 123 N. Y. 272, 25 N. E. 319; Central Nat'l Bank v. Conn., etc., Co., 104 U. S. 54; In re Hallett's Est., 13 Ch. D. 696 (Eng.).

just before it closes its doors.[99] But it is indispensable to the claim for preferential payment out of the proceeds of the estate of an insolvent on the basis of confusion of one's property therein, that clear proof be made that the property is actually included in the estate and went into a specific fund or a specific, identified piece of property which came into the hands of the receiver or trustee in bankruptcy. It is not sufficient merely to prove that trust property or its proceeds went into the general assets of the insolvent estate.[1]

54. **As between innocent contributors.**—Where a trustee, or fiduciary, has mingled in a common fund the moneys of several different equitable owners, and has then made payments out of the common fund, the legal presumption is that the moneys were paid out in the order they were paid in, and the contributors are equitably entitled to claim the preference in the inverse order of time of their respective contributions to the fund. Thus, in Cohnfeld v. Tanenbaum,[2] a guardian having a bank account in his name as guardian, deposited in the guardianship account moneys belonging to a manufacturing company of which he was manager. There were no individual moneys of the trustee involved. It was a case where the account standing in the name of Cohnfeld was made up of the deposits of two dis-

[99] J. B. Ames, Following Misappropriated Property into its Product, 19 Harvard Law Review 511.

[1] The rules by which preferential payments of the proceeds of property confused by an insolvent must be adjudged are well summarized by Sanborn, J., in the case of Empire State Surety Company v. Carrol County, 194 Fed. 593.

[2] 68 N. Y. Suppl. 1023.

tinct parties, and Cohnfeld, acting in a fiduciary capacity for both, mingled their moneys. The court held that as between the two contributors the rule in Clayton's case applied.[3] That was a case of a banking account, where various sums were paid into and withdrawn from one blended fund. Sir William Grant, in his opinion, says:

"In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts."

In Knatchbull v. Hallett,[4] it was held by Fry, J., that as between two cestuis que trustent, whose money the trustee has paid into his own account at his banker's, the rule in Clayton's case applies, so that the first sum paid in will be held to have been the first drawn out. And in Hancock v. Smith,[5] it was held that, as between cestuis que trustent, the rule in Clayton's case is applicable.

[3] Devaynes v. Noble, 1 Mer. 580 (Eng.).

[4] In re Hallett's Est., 13 Ch. Div. 696 (Eng.).

[5] 41 Ch. Div. 456 (Eng.). Compare, however, In re Mulligan, 116 Fed. 715, 16 Harvard Law Review 148.

CHAPTER IX.

TITLE BY GIFT.

55. **Transfer of title by act of the parties.**—Every right of property has a title or source from which it is derived. We have considered title by original acquisition; we now proceed to titles which are derivative, as where the hunter, fisherman, or adverse possessor transfers his acquired right to another. Transfer may be either by act of the parties, or by act of law, according as it occurs by declaration of the will of the owner, as in gift or sale, or is involuntary as in case of intestate succession, execution sale, or bankruptcy. Acts of the parties may be unilateral, if there is only one party whose will is operative, as in gifts and deeds; or bilateral, if agreement or mutual concurrence of both transferor and transferee is involved, as in sales.

56. **Nature of gift.**—A gift is a present renunciation or relinquishment of title by one to another, with the intention that the title pass to the donee without remuneration or consideration. This is effected either by the expression of an intent to give, executed by delivery of the thing given to the donee or to someone for his benefit; or by the declaration of the intent to give evidenced by a deed duly sealed and delivered. Gift is a unilateral act and may be effectuated without the agreement, acceptance, or knowledge of the donee, though subject to rejection

by him. It is sometimes attempted to assimilate gifts to bilateral agreements by saying that the acceptance is presumed; but in reality, the essential elements in gift are: (1) an intent to make a present gift, and either (2) physical relinquishment of dominion by delivery, or (3) delivery of a deed or writing as formal evidence of the transaction. The requirement of delivery is probably founded on the policy of exacting tangible evidence of a clear, final, and deliberate intent to give, and of preventing fraud.

57. **Gift by deed.**—The general rule is that the declaration of a present transfer evidenced by a deed duly executed and delivered by the donor is a valid gift inter vivos (between living persons) without any delivery of the property itself.[6] Thus, in Driscoll v. Driscoll,[7] a father, several years before his death, executed a written instrument assigning to his daughter certain real estate and also his interest in a partnership, including all the machinery, tools, and personal property of the firm of which he was a member. The instrument was delivered to a third party for safe-keeping, who kept it until after the death of the father, when he delivered it to the daughter. The father continued his former relations with his partners and acted as a member of the firm until his death, just as before the execution of the deed. His widow was appointed administratrix of his estate and sued to recover the property on the

[6] It is doubtful whether a gift causa mortis (in view of death) can be made by deed without a delivery of the property given. 20 Cyc. Gifts, p. 1235, note 25; Knight v. Tripp, 121 Cal. 674, 54 Pac. 267.

[7] 143 Cal. 528, 77 Pac. 471.

ground that the deed was made without consideration, and that possession of the personal property therein described was not delivered to the daughter in the lifetime of her father, but was retained by him until his death. It was held that delivery of the written instrument was sufficient to make a valid gift, and the fact that the father continued to deal with the partnership property as if he owned it did not impair the title obtained by the daughter, nor restore the ownership to the father.

An instrument of gift, it seems, would have to be under seal where the donor retains possession, in states where a seal is required for a deed or conveyance of real property.[8] It has been held that the delivery of a written assignment or bill of sale of stock by way of gift is insufficient to complete a valid gift where the vendor retains and uses the certificates to control the stock. One ground of the decision was that the delivery of the certificates of stock, when they are present and their delivery is practicable, is indispensable to a valid gift of the stock, because the possession of the certificates commands the dominion of the stock in the most effectual way.[9]

58. **Delivery, necessity of.**—Mere words of gift, as "I give you these colts," are inoperative, the mere oral declaration or promise that title shall pass by way of gift having no effect.[10] To constitute a valid gift there must be an intention to give, likewise a

[8] Connor v. Trawick's Admr., 37 Ala. 289, 79 Am. Dec. 58.

[9] Allen-West Com. Co. v. Grumbles, 129 Fed. 287, LEADING ILLUSTRATIVE CASES.

[10] Irons v. Smallpiece, (1819) 2 B. & Ald. 551; Cochrane v. Moore, 25 Q. B. D. 57.

delivery to the donee, or to someone for him. The intention must be executed by a complete and unconditional delivery.

There is no valid gift unless there has been present relinquishment of dominion by the donor. Thus, if a husband places certain securities in an envelope and endorses it, "The enclosed are for my wife, Mary," signs his name, and puts the envelope with its contents into his safe deposit box, this is not a valid gift. There has been no delivery and a gift cannot be made to take effect in the future. So, if he tells his nurse in his last sickness that his pocket-book or watch is under his pillow, and that she is to take it and give it to his wife, and the pocket-book or watch is not handed over until after his death, it would not be a valid gift, as there would have been no delivery in the lifetime of the donor.[11] In Liebe v. Battmann,[12] one about to commit suicide endorsed a promissory note, sealed it in an envelope directed to a friend with whom he was living, placed it in an envelope upon a table beside his bed, together with a letter to the friend, and then shot himself. The friend rushed in from his room in another part of the house, but the dying man, without referring to the gift, passed into a comatose state from which he never rallied.

It was held that there had been no delivery of the note in spite of the fact that the friend had picked up the envelope before the donor died, though after he became unconscious. The court said, "There

[11] Wilcox v. Matteson, 53 Wis. 23, 9 N. W. 814.

[12] 33 Ore. 241, 54 Pac. 179, 72 Am. St. Rep. 705, 12 Harvard Law Review 349.

must be a parting with dominion over the subject matter of the gift with the present design that the title shall pass out of the donor to the donee." There was a change of possession before death, yet placing the addressed envelope on the table where it was still under the hand of the donor was not a delivery. Receipt of the letter as intended during life might possibly have been held equivalent to delivery of a deed. Thus if a document is mailed by a man about to die, but he becomes unconscious or dies before it is actually received, there would doubtless be held to be a delivery by the act of mailing and putting it beyond his recall.

59. **Change of possession not required in gifts inter vivos (between living persons).**—Delivery may either precede or follow the declaration of gift, and where goods are already in the exclusive possession of the donee, the mere oral declaration completes the gift, the act of the donor in receiving back and redelivering to the donee the subject of the gift being excused as a useless ceremony, at least as to gifts inter vivos (between living persons).[13] There must, however, be nothing left to be carried out by the donor, or he will have a locus pœnitentiæ (an opportunity for repentance). It is not necessary that the donee retain possession after delivery. In a Michigan case, plaintiff brought replevin for possession of a ring, to which he claimed title by gift, against a decedent's estate. While they were at a party playing cards, the decedent, an elderly aunt, gave plaintiff

[13] 10 Harvard Law Review 306; 18 Harvard Law Review 394. The rule may be otherwise as to gifts causa mortis, or where the parties reside together.

a diamond ring and he accepted it; the donor then borrowed the ring back to wear until she was done with it and kept the ring in her possession until her death. It was held that the loan by the donee to the donor did not affect his title. Retention or resumption of possession by the donor has no effect on the gift except as evidence of no delivery, or of no present intent to give.[14]

60. **Declaration of trust.**—There is a wide difference between the stern and unbending rule of the common law which makes either delivery or a deed essential to a gift of the legal title, and the rule of equity which recognizes a gratuitous parol declaration of trust as sufficient for a gift of an equitable interest. The fact remains that delivery is not necessary to a gift made by way of a declaration of trust. Thus, in Harris Banking Co. v. Miller,[15] a bank issued to B a certificate of deposit for $8,000, which he endorsed to Mrs. Miller before his death. When B died, this certificate of deposit was found in a leathern bag sewed in his shirt. He kept it to draw the interest while he lived. The defense was set up that the gift was invalid for want of delivery of the certificate; but it was held that while there was no sufficient delivery to make a perfect gift, yet the assignment was valid as a declaration of trust of which the donor was trustee.[16]

[14] Garrison v. Union Trust Co., 164 Mich. 345, 129 N. W. 691, 32 L. R. A. (N. S.) 219; but in gifts causa mortis in some courts the donee must retain possession; see Parker v. Copland, 64 Atl. 129 (N. J.); 20 Harvard Law Review 151; 12 Harvard Law Review 570.

[15] 190 Mo. 640, 89 S. W. 629, 1 L. R. A. (N. S.) 790.

[16] See also Dewey v. Barnhouse, 83 Kan. 12, 109 Pac. 1081, 29 L. R. A. (N. S.) 166, note.

61. **Constructive delivery.**—Ceremonial or constructive delivery is held sufficient under special circumstances when manual delivery is inconvenient, as where articles are of a bulky character or not readily accessible. Thus, in Waite v. Grubbe,[17] a father pointed out to his daughter various places on his farm where his money was buried and declared that he gave it to her. The daughter did not remove the money until after the father's death, yet the pointing out of the hiding places was held a valid constructive delivery. Principle requires, however, that delivery shall, in every case, consist as far as practicable of a delivery of that thing which will most effectually and irrevocably divest the donor of the dominion and the control of the subject of the gift.[18] A document, such as a bill of lading, a deposit book, a stock certificate may be given where it represents the title and is the means to command control of the property. These documents of title are often, by usage, essential to control or deal with the property, and it has been held that a written assignment of corporate stock is inadequate to transfer title where the donor retains the stock certificates.

Property kept in a bureau or trunk not readily accessible, and ponderous or bulky articles kept in a warehouse, may be delivered by delivery of the key to the receptacle or place of storage.[19] Con-

[17] 43 Ore. 406, 73 Pac. 206, 99 Am. St. Rep. 764.

[18] Allen-West Com. Co. v. Grumbles, 129 Fed. 287, LEADING ILLUSTRATIVE CASES.

[19] Thomas' Admr. v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

structive delivery, however, seems to be limited to such property as is not reasonably capable of actual transfer, or manual delivery. A delivery of the key to a receptacle which is itself present and capable of delivery will not of itself constitute a delivery of its contents, as this is not the best delivery possible under the circumstances.[20] So it was held that a direction to a person who already had both keys of a small box to take "my" key and keep it, with a declaration of gift of the stock in the box which was in an adjoining room, was not a good delivery to sustain a gift causa mortis (in view of death).[21] As is shown, however, in many cases collected in the note to the case last cited, there is a great diversity in the decisions as to when the delivery of a key to a cash box, bureau, trunk, desk, or other receptacle, will be a good and sufficient gift of the contents, and what is a valid reason for handing over the key rather than the receptacle itself or its contents.

62. **Gift of one's own, or another's, obligation.**—The gift of one's own check or promissory note is, in effect, a mere promise to give, like signing a subscription paper, and as such is revocable. In a Kentucky case, deceased signed checks to his wife and to his nephew for $500.00 each, payable out of his estate after his death, and the checks were delivered. He also endorsed a note to his wife, but by the endorsement reserved the interest for himself as long as he should live, and the principal of the note in

[20] Compare Keepers v. Fidelity, etc., Co., 56 N. J. L. 302, 28 Atl. 585, 23 L. R. A. 184.

[21] Apache State Bank v. Daniels, 121 Pac. 237 (Okla.), 40 L. R. A. (N. S.) 901, note, LEADING ILLUSTRATIVE CASES.

case he survived her. It was held that the checks were not good as a gift, being mere orders incomplete until paid or accepted. As to the note, the rights retained by the donor were inconsistent with a gift since the transfer was not to become effective until the death of the donor, and such limitation makes it an attempted testamentary disposition rather than a gift.[22] It is, however, held by some states that a check drawn on a bank for the entire amount of the drawer's credit therein and delivered as a gift of the money, amounts to a present assignment of the debt due from the bank to a depositor, even though unaccepted by the bank.[23]

The voluntary and gratuitous assignment of an obligation already created against some other party is entirely different from the gift of one's own check or promissory note. The law is somewhat unsettled as to what is necessary in order to make a valid gift of a chose in action. Where a chose in action such as corporate stock, or a deposit in a savings bank, or an insurance policy, is evidenced by a document, it may be transferred by a deed or by the delivery of the certificate, deposit book or other document representing the obligation. A delivery of certificates of corporate stock to the donee or a declaration of trust by the donor, although without endorsement of the certificates and without transfer or registration on the books of the corporation as required by its by-laws, is generally held sufficient to constitute a valid

[22] Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308, Ann. Cas. 327.

[23] Varley v. Sims, 100 Minn. 331, 111 N. W. 269, 8 L. R. A. (N. S.) 828.

gift of stock. The theory of this is said to be that title passes to the document and carries with it a power of attorney to the donee to transfer the stock or collect the claim for his own use.[24]

A parol chose in action like a debt is incapable of delivery and it would seem on the authorities that a voluntary written assignment of a parol chose in action is revocable. Only by a declaration of trust can there be a valid gift of a parol chose in action.[25]

Gifts of the personal obligation of a third party may also be accomplished by making a contract such as life insurance for the express benefit of the donee; or by a deposit of money in a bank in trust for the donee even without his knowledge, where the deposit book evidences the donee's beneficial interest. By the weight of authority the mere deposit of money in the depositor's own name in trust for a third party, although without delivery of the pass book or other evidence of intention to make a gift, will be sufficient, of itself, to constitute a valid gift.[26] But if A deposits money in a savings bank in the name of B and takes the savings bank book in B's name, it is a question of fact whether he intends to create a claim for B, or for himself in B's name. There must be a clear intention on the part of the donor to relinquish immediately to the donee all control over the fund. Thus where A put a deposit in the names of A and B, there was held to be no gift, since A would retain control during

[24] Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912 C. 1221, 5 Harvard Law Review 35; 24 Harvard Law Review 428.

[25] See Bond v. Bunting, 78 Penn. St. 210, 213, 218.

[26] See note 1 L. R. A. (N. S.) p. 790; 20 Cyc. Gifts, p. 1204.

his life.[27] The idea of a gift is inconsistent with the retention by the donor of power to withdraw the deposit from the bank.[28] In the case of trust deposits in a savings bank in the depositor's own name as trustee, for the benefit of third parties (where the depositor retains the deposit book in his own hands), it is held in New York that these are "tentative" trusts merely, revocable at will by the depositor in his lifetime; but if the depositor dies without having revoked the gift, a presumption arises that an absolute trust was created as to the balance on hand.[29] The donor-depositor thus enjoys full dominion of the money during his life and the gift in reality takes effect on death.[30]

In case of an ordinary deposit in a commercial bank, delivery of the deposit book, which is a mere receipt, would not be a valid gift, as the deposit book is not the indispensable key to the deposit, which may be drawn without it.

63. **Conditional gifts.**—Gifts may be qualified by reservations in favor of the giver as to the income, use, or enjoyment of the thing given, and these are not necessarily inconsistent with the absolute character of the gift.[31] In Williamson v. Johnson,[32] plaintiff let defendant have certain sums of money

[27] Schippers v. Kempkes, 67 Atl. 74 (N. J.), 12 L. R. A. (N. S.) 355, 22 Harvard Law Review 453.

[28] Compare the case of Denigan v. Hibernian, etc., Society, 127 Cal. 137, 141, 59 Pac. 389.

[29] Re Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 19 Harvard Law Review 207.

[30] 19 Harvard Law Review 207, 18 Ib. 70, 626.

[31] Candee v. Conn. Savings Bank, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568, 22 Harvard Law Review 453.

[32] 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277.

as gifts in the expectation by both parties of marriage. The gifts were made for the purchase of wardrobe and for traveling expenses of the girl. It was held that when she broke the engagement the money could be recovered for breach of conditions on which the gifts were made. The mere gift of the use or the income of a thing would be a loan rather than a gift.

64. **Gifts causa mortis.**—Gifts causa mortis, that is, in view of death, are those which are made in contemplation, fear or peril of death then imminent, as the moving cause; as when a person in serious sickness, apprehending his dissolution near, delivers or causes to be delivered to another possession of any personal goods to keep in case of his decease. The gift is vested by delivery, but is accompanied with this express or implied condition, that if the donor lives, the property shall revert to him. The gift, though vested, is defeasible by revocation at any time. It has thus the revocable quality of a legacy or bequest, and in this differs from a gift inter vivos (between living persons). Gifts inter vivos and gifts causa mortis are alike in most particulars, but different in this important respect—a gift inter vivos must be irrevocable or it is invalid, while a gift causa mortis is revocable by the donor at any time before his death.[33] At law a gift inter vivos would be void if a donor reserved the power of reclaiming or revoking it at will; yet in equity, a revocable gift inter vivos may be made by the device of a revocable declaration of trust.

[33] Basket v. Hassell, 107 U. S. 602.

There is some conflict in the authorities whether title vests at once upon delivery, subject to be defeated by recovery of the donor or by revocation, or whether title vests only on death. By the better view title passes when the gift is made, subject to certain conditions subsequent.[34]

There must be a delivery, actual or symbolic, and this is even more strictly insisted on than in the case of gifts inter vivos.[35] Since virtually (though not technically) a gift causa mortis amounts to a testamentary disposition, a formal act of delivery should be required to supply a substitute for the formalities of an attested will, and the gift should remain entirely beyond the control of the donor. A gift made in the absence of sufficient peril of death, which is to take effect only on the death of the donor, and where death is a condition precedent to the relinquishment of dominion, is void. So where delivery of certificates of deposit was qualified by an endorsement which restrained the authority of the donee in the collection of the money and forbade its payment until the donor's death, this was held not a valid gift causa mortis. Such a gift is a testamentary disposition to take effect only on the death of the donor, which must be made with the formalities of a will. It is not a present executed gift.

65. **Invalid gifts.**—There are the same requisites of capacity, fairness, and freedom from fraud and

[34] Johnson v. Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884, 891, note.

[35] 18 Harvard Law Review 394; 20 Harvard Law Review 151. Parker v. Copland, 64 Atl. 129 (N. J.). Compare 12 Harvard Law Review 570.

constraint upon the donor in the case of gifts as in the case of contracts; but from their gratuitous nature gifts may be even more closely scanned than bargains. There is a presumption of undue influence from the existence of confidential relations, such as that of attorney and client, priest and penitent, guardian and ward, between parties to a gift inter vivos, probably also in case of a gift causa mortis, but not in the case of a testamentary gift.[36] Further, as to third parties, a man must be just before he is generous; and the donor's creditors may impeach a gift made in fraud of their claims when he is insolvent.

[36] 14 Harvard Law Review 73; 22 Harvard Law Review 539.

BAILMENTS

CHAPTER X.

THE NATURE OF BAILMENT.

66. **Special proprietary interests.**—Having considered the different kinds of titles by which ownership may be acquired in things personal, we proceed to the principal modifications of absolute ownership by which partial interests may be held in the same object by several proprietors. Ownership, the full and complete dominion of a single proprietor over an object, by which he may deal with the thing as he pleases and exclude all others, may be split up and subdivided in various ways among several proprietors. This is most elaborately carried out in the common law system of estates in land, in a single parcel of which there may be interests of the most manifold variety as to duration, extent and number of tenants. In personal property the subdivision of ownership is much simpler, the most important subordinate interests being (1) bailments, or possessory rights under the ultimate owner; (2) plurality of tenants, as where two or more persons are co-owners; (3) future estates; (4) security interests, as where the ownership is divided between pledgor and pledgee or between mortgagor and

mortgagee, and (5) equitable interests. Such are the principal modifications of absolute ownership, by which lesser rights or qualified interests are divided off from the complete or entire ownership.

67. **The law of bailments.**—The general term bailments embraces transactions so diverse in their objects and legal consequences that one would hardly expect to find it the title word of an important subject, or special branch of the law; yet Lord Holt, in the celebrated case of Coggs v. Bernard,[37] imported into the common law a classification of bailment contracts from the Roman system, and three-quarters of a century later (1781), Sir William Jones wrote his famous Essay on the Law of Bailments. Since that time, we have had a number of learned treatises upon this subject as a recognized topic of our common law, notably the treatise of Mr. Justice Story.

68. **Scope of law of bailments.**—The various forms of bailment: the deposit of goods to be kept by the bailee without reward (*depositum*); the gratuitous lending for use by the bailee without reward (*commodatum*); the letting and hiring of goods for a rental (*locatio rei*); the delivery for hired services to be performed upon a chattel (*locatio operis faciendi*); for storage (*locatio custodiae*); for transportation and carriage (*locatio operis mercium vehendarum*); the pledge of goods as security for an obligation (*pignus*); all these varieties of transactions have only two connecting threads to justify treating them together, namely: (1) the severance

[37] Queen's Bench, (1703) 2 Ld. Raym. 909 (Eng.).

of possession from the ownership or general property; and (2) the imposition by the law of certain obligations upon the bailee on the basis of his undertaking the care or charge of the property. These different bailments, the pledge, the deposit for safe custody, the delivery to a carrier or to an artisan who is to do work upon a thing, the gratuitous loan, the letting for hire, give rise to very different obligations and tort liabilities between the parties according to the nature of the transaction. The law of bailments customarily includes a treatment of special obligations and liabilities of innkeepers, carriers of goods, and also carriers of passengers, particularly railroads, as well as of liens and pledges; the topic, in short, seems a miscellaneous dumping-ground or hodge-podge of a variety of subjects little related, which have found no other grouping or abiding place in our law, and of which the bailment relation is not always the most significant feature.

We shall first consider the nature of bailment and distinguish it from certain other transactions; and then proceed to examine the respective rights of property in the thing bailed, particularly with reference to third persons; and lastly, consider more particularly the obligations of bailor and bailee as between themselves.

69. **Creation of bailment.**—Bailment (derived from the French *bailler,* to deliver) arises where the possession and charge of goods are accepted by the bailee on delivery or consent of the bailor, giving the bailee the exclusive control for the time being, upon the understanding, express or implied, that

the goods shall be redelivered to the bailor either on demand or at an agreed time, or dealt with according to his directions. Bailment may, however, be created, even where there is no delivery or actual consent by the bailor, as where control is assumed over goods apparently lost or abandoned, and the finder takes charge of the goods for the owner; so where one takes a watch from the person of a drunken owner with friendly intention, a bailment arises. By attornment, a person in possession may become the bailee of another by agreeing to hold under him as general owner.[38]

Bailment is, then, the holding of possession of goods for some temporary purpose subordinate to the title of another who, as between the parties, has the right of possession whenever the bailment may be determined.[39] In general, any person is to be considered as a bailee who consents to hold possession of a thing of another upon an undertaking, express or implied, either to return the thing to him, or deliver it according to his authorization.[40]

70. **Acceptance of bailment.**—The duties and responsibilities of a bailee cannot be thrust upon one without his knowledge or consent. They must be voluntarily undertaken or assumed by the party to be charged, or by his agent duly authorized. This is illustrated in cases relating to the liability of a storekeeper for the loss of a customer's property. Wamser v. Browning, etc., Company is such a case.[41]

[38] Pollock & Wright, Possession, p. 134.
[39] Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229.
[40] Pollock & Wright, Possession, p. 163.
[41] 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314.

Plaintiff visited defendant's store and purchased a vest. The clerk, being busy, told plaintiff where the vests were piled, and suggested that he select one and try it on. After the plaintiff had done so, he found that the contents of his own vest, a watch, pin, and cigar cutter, had been stolen. He brought suit for the loss of these valuables, but it was held that the plaintiff could not recover from the shopkeeper. The shopkeeper impliedly assumes charge of the goods as bailee, where the customer lays them aside temporarily at the request of the clerk and in his presence, in order that new garments may be tried on, and then he owes a duty of reasonable care. But in the absence of an invitation so to deposit goods, there is no implied undertaking to exercise care over property thus laid aside.[42]

The same principle is illustrated in another case, where a person at a depot turned his grips over to the porter of a hotel, and the porter put the grips in the hotel office. The owner of the grips did not become a guest, or procure accommodation at the hotel, and the clerk's attention was not called to the deposit of the grips. It was held that the acceptance of the chattel by the porter on behalf of the hotel was unauthorized and outside the real or apparent scope of his powers as a servant. He accordingly bound only himself as bailee, and not his employer. It was the same as if the porter had brought up the grip of a friend, or stranger, on his own account.[43]

[42] 20 Harvard Law Review 491.

[43] Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930.

71. **Adverse possession.**—Bailment is to be contrasted with certain transactions bearing some resemblance to it; among others, adverse or tortious possession, acquired either by unlawful taking or by conversion, not in subordination to another or with recognition of his title. Only where possession of chattels is lawfully and rightfully severed from the paramount ownership or title is there bailment. In the quasi-bailment of the tortious possessor, he must account absolutely for what he holds, as he is an offender against the rights of the owner.

72. **Custody.**—Bailment must be distinguished also from custody, as where a servant has the care of his master's goods or chattels in the master's or principal's name, and subject to his control, as a butler of plate, a shepherd of sheep, a clerk of merchandise,[44] and the like. The mere agent or servant has not any bailment, possession or qualified property right, but only the oversight or custody. The bailee holds possession in his own name, though subordinate to the title of another; the servant or agent holds custody in the name of his master. So of a person having the use of anything under the supervision and control of the owner: as a guest who has the use of furniture and plate at an inn, or a customer who is allowed to examine a watch under the present control of the shopkeeper; these generally have not possession, but mere custody under the present control of the actual possessor whose directions they are required to follow. The master is

[44] Bloss v. Holman, Owen 52 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 237.

alone regarded as being the possessor and the servant has the mere custody, except, by a peculiar anomaly of the criminal law, when he receives possession from some third person to hold a thing for his master; then he is held to possess as bailee until he has done some act by which the thing is appropriated to the master's use.[45] Suppose that the owner of a horse hires it out for a month to a customer who lends it to a friend, who sends out his servant to exercise it in the park. Here the owner's right to possess is suspended during the month and vested in the customer. The friend has the possession as a sub-bailee of the customer, while the servant has merely the custody.[46]

73. **Bailment or sale.**—The question whether there is a bailment or a sale is often a close one, particularly in the case of deposits in grain elevators. It may become a question of great importance, as in case of accidental destruction of the grain in the warehouse by fire or otherwise, without fault; if there is a bailment, the depositor is the loser; if a sale, the warehouseman must still pay for the goods. On the other hand, if the warehouseman should fail, the bailor could demand the goods back in specie; but if there is a sale, the depositor must share the assets with the general creditors.

Where articles are delivered to be manufactured, if the product of the identical grain, milk or other materials delivered is to be returned to the original owner in a new form, as in that of flour, cheese, etc.,

[45] Pollock & Wright on Possession, p. 60.
[46] See Pollock on Torts (8th ed.), p. 343.

it is a bailment, and the title does not vest in the manufacturer. But where there is no obligation to return the specific article, or its proceeds, and the receiver may pay the price or deliver another article of equal value in its place, it is a sale, and title vests in the manufacturer.[47]

74. **Elevator cases.**—The rules as to the deposit of grain in grain elevators and warehouses are somewhat exceptional. Grain is delivered to these warehouses in the usual course of dealing, with authority to the warehouseman to mingle the grain with the mass of grain of similar quality belonging to himself and others in the warehouse, and to add to and draw from the fluctuating mass on the order of the holders of warehouse receipts. The entire contents of the warehouse may change several times over; and yet, where it is the duty of the warehouseman to keep in his elevator sufficient grain to meet the outstanding receipts, the courts give effect to the intention of the parties that each depositor shall retain title as tenant in common of the mass contained in the warehouse to the extent of his contribution. The deposit is thus a bailment, and the warehouseman is a bailee to keep the grain, with power to change the bailor's ownership in severalty into a tenancy in common of a larger mass and back again; and with the continuous power of sale, substitution and resale.[48]

[47] Laflin & Rand Powder Co. v. Burkhardt, 97 U. S. 110; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Savage v. Salem Mills Co., 48 Ore. 1, 85 Pac. 69, LEADING ILLUSTRATIVE CASES. Van Zile, Bailments and Carriers (2nd ed.), § 138.

[48] Williston, Sales, § 154; 35 Cyc. (Sales), p. 31.

So in the case of stock carried on margin by a stock broker, it is not necessary for the broker to retain or keep separate the identical stock purchased on his customer's order; but it is sufficient if he has on hand at all times an equal amount of the same stock which he can deliver, if required. After the purchase on his account, the customer becomes an equitable tenant in common of all the stock of that kind in the broker's hands, and the nature of the stock identifies the fund as fully as a grain elevator identifies grain for which receipts are out. The stock is deemed pledged to the broker as security for the unpaid balance of the purchase price.[49]

75. **Effect of option to buy or sell.**—In the case of grain elevators, it is generally held that where the warehouseman has the option to deliver the grain, or to sell it when the market is favorable and pay the market price on presentation of the warehouse receipt, the transaction is a sale and title passes in the absence of special circumstances showing that the parties intended a bailment.[50] But where the depositor has the option to demand a redelivery in kind, or to sell to the warehouseman, it is generally held to be a bailment up to the time that the option is exercised by the depositor.[51]

76. **Consignment or sale.**—If goods are delivered by A to B on consignment with authority in B to

[49] Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 Law Ed. 835.

[50] Chase v. Washburn, 1 Oh. St. 244, 59 Am. Dec. 623; Savage v. Salem Mills Co., 48 Ore. 1, 85 Pac. 69, 10 A. & E. Ann. Cas. 1065, 1074, note, LEADING ILLUSTRATIVE CASES; but compare State v. Rieger, 59 Minn. 151, 60 N. W. 1087; 6 Harvard Law Review 450.

[51] Yockey v. Smith, 181 Ill. 564, 54 N. E. Rep. 1048; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. Rep. 637.

sell the goods in the course of his business, A to bear risk of loss and B to account for the proceeds of the sales, it is a bailment and not a sale.[52] This is so even though an invoice or bill for the wholesale price be sent to the consignee. In an Illinois case, one Fleet consigned furs to K & Co. to be handled and sold for his account, the proceeds to be held in trust and settlement to be made in 30, 60, and 90 days, as soon as the money might be collected. The goods were accompanied by invoices, in all of which they were described as being sent on consignment. It was held that the transaction was not a sale with the option of returning, but rather a bailment, and that K & Co. did not become indebted on receipt of the furs, but were agents for sale under duty to account for the proceeds. The risk of loss was, accordingly, on the consignor, and the property of the principal was not subject to levy and sale on execution by creditors of the agent.[53] The rule would be otherwise where the transaction was a consignment merely in form, but in reality a device to disguise an absolute sale and preserve a lien or security against other creditors.[54]

[52] Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 Law Ed. 1093.

[53] Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192.

[54] Dr. Miles Med. Co. v. John D. Park & Son Co., 220 U. S. 373, 55 L. Ed. 502.

CHAPTER XI.

RESPECTIVE PROPERTY RIGHTS AND INTERESTS OF BAILOR AND BAILEE.

77. **Possessory interest of the bailee.**—The present occupation, control and power of dealing with a thing is one of the important attributes of perfect ownership. In all these instances of bailment this possessory interest is severed from the ownership or general property and transferred from the bailor to the bailee, who is said to have a special property by virtue of his transient and qualified right of possession.

Yet this is not an absolute property or ownership because of the general property which the bailor still has left in him. Indeed, there is strictly no absolute property or ownership in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor has only the future or reversionary right and not the immediate possession; the bailee has the possession, but only an interest of limited duration, perhaps altogether precarious and liable to be determined any moment at the will of the bailor. While no one enjoys absolute dominion or full ownership, and there is a qualified property in two persons, yet it is customary to speak of the bailor as the owner, though he has ceased to possess for a time, treating the potential and future as actually existent.

78. **Special property of bailee as against bailor.**—As between bailor and bailee, the possessory interest of the latter is a substantial right which exists and has advantages apart from the ultimate owner's general property. Whether the bailee has any special property right more extensive than the mere possession depends on the nature of the transaction: the gratuitous bailee (as in deposits, mandates, loans) would seem to have no higher right than possession and no right of detention as against the owner; while the bailee who has hired things for use and the pledgee who holds for security have a higher interest, something in the nature of an estate carved out of the general ownership. Thus, if a man hires a horse for a month, he has a qualified property during that period.

79. **Property rights of bailee as against strangers.**—We have seen heretofore that bare possession, even when wrongful and adverse to the true owner, is a title to protection against the world at large. And, on account of his possession, even the gratuitous bailee may maintain actions against such as injure or take away the chattels.[55] The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker and the gratuitous bailee may all of them vindicate, in their own right, this their possession against any stranger or third person. Where the bailee has been dispossessed of the property by a stranger he may maintain trespass, trover, detinue, or replevin on the basis of his possession. Even a

[55] Rooth v. Wilson, 1 B. & Ald. 59 (Eng.), 1 Gray, Cases on Property, p. 256.

wrongful possessor may recover full damages or the return of a specific thing from a stranger to the title on the strength of his bare possession.[56] As between bailee and stranger, a bailee is treated exactly as the owner and recovers the whole value or entire damage against the defendant, who cannot set up the right of a third person (*jus tertii*) unless he claims under it.[57] The bailee's possession gives him title against the world, though he is bound to account for damages which he recovers beyond his interest in the thing bailed to the general proprietor.

This rule by which a bailee, finder or wrongful possessor is permitted to sue and recover damages which he has not sustained, and by such recovery bar a subsequent action by the bailor for an injury to his general property without his consent, is criticized as unsound by certain authorities.[58] It is suggested that the general owner and the one having a special property should each bring an action for the actual loss or damage to his own particular interest. This might well be the rule where the person in possession does not claim complete title, or where the general owner does not consent to his recovering the total loss. Indeed, it is recognized that the mere naked bailee, at the will of the bailor, cannot recover against a third person for the conversion of

[56] Holmes, Common Law, pp. 166, 174, 211; Pollock on Torts (8th ed.), p. 369.

[57] The Winkfield (1902), P. 42; 1 Gray, Cases on Property, p. 270; overruling Claridge v. S. Tramway Co., (1892) 1 Q. B. 422 (Eng.), 1 Gray, Cases on Property, p. 268. U. P. R. R. v. Meyer, 76 Neb. 549, 107 N. W. 793, 14 A. & E. Ann. Cas. 634, note.

[58] 25 Harvard Law Review 655; 2 Beven, Negligence (3d ed.), p. 736, 737, note.

the bailed property, where the bailor or owner has intervened and asserted his general property. It is otherwise in the case of a bailee with the right of possession for a specific time and purpose, who has the right to recover to the extent of the value of his special interest in the property, even where the general owner intervenes.[59] It does seem strange that a bailee is entitled to recover for the entire damage done to property by its injury, loss, or misappropriation, while a joint owner of personal property who sues without joining the other co-owners is entitled to recover only his proportionate part of such damage.[60] But it is generally recognized that "the peace and order of society require that persons in possession of property, even without title, should be enabled to protect such possession by appropriate remedies against mere naked wrongdoers."[61] Thus the United States government in carrying on the postoffice is bailee of the letters and their contents for hire, and has sufficient interest to maintain an action of trespass or trover against a thief or wrongdoer for disturbing that possession like any other bailee, and may recover the entire value of the property.[62]

80. **Reversionary right of bailor.**—Under the old common law forms of action, a bailor could not bring an action of trespass, trover or detinue, these actions being founded upon a violation of possession

59 Engel v. Scott & H. L. Co., 60 Minn. 39, 61 N. W. 825.

60 Waggoner v. Snody, 98 Tex. 512, 85 S. W. 1134.

61 Guttner v. Pacific, etc., Co., 96 Fed. 617, LEADING ILLUSTRATIVE CASES; 13 Harvard Law Review 411.

62 Nat'l Surety Co. v. U. S., 129 Fed. 70, 73.

or upon an immediate right of possession.[63] Where any permanent injury is done to the chattel, however, the bailor may maintain an action on the case against a third party for the injury to his reversionary interest.[64] The bailor has also concurrent possessory remedies with the bailee if the bailment is revocable by him at his pleasure, as in the case of a gratuitous loan where the bailee has no vested interest or right to the beneficial use of the property, and possession is said to remain "constructively" in the owner.[65] In Ames v. Palmer,[66] it was held that where the defendant took the goods from a carrier which had a lien on them, the owner could, nevertheless, bring trover on the ground that the owner of the goods had the right to immediate possession as against a tort-feasor. This case seems somewhat inconsistent with the general rule that trover will not lie at the suit of the bailor against a third person, but it has been followed in certain jurisdictions.[67]

There is a conflict of authority as to whether, if a bailee or his servant contribute by negligence to the injury of the goods, so as to prevent recovery by the bailee from a third person, such contributory

[63] Wilby v. Bower, 1 Gray, Cases on Property (2nd ed.), p. 241; Wilson v. Martin, 40 N. H. 88, 1 Gray, Cases on Property (2nd ed.), p. 249; Gordon v. Harper, (1796) K. B., 7 T. R. 9 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 242.

[64] Hall v. Pickard, 3 Campbell 187 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 246; N. Y., etc., Ry. Co. v. N. J., etc., Ry. Co., 60 N. J. L. 338, 38 Atl. 828, LEADING ILLUSTRATIVE CASES.

[65] Lotan v. Cross, 2 Campbell 464 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 245.

[66] 42 Me. 197, 1 Gray, Cases on Property (2nd ed.), p. 246.

[67] Stowell v. Otis, 71 N. Y. 36.

negligence is imputable to the bailor so as to prevent a recovery by him. The owner is, of course, not liable for an injury to a stranger by the negligent use of an automobile or other property which he has loaned to a bailee, who has complete control of its operation.[68] It would accordingly seem to be the better view that a livery-stable keeper or other bailor would not be barred of his right to recover in case of injury to his reversionary interest by the contributory negligence of the hirer of the animal or other goods.[69]

81. **Termination of bailment.**—A gratuitous bailment is terminated by the death either of the bailor or the bailee, and the executors of persons who have borrowed things should return them. In any case, whether the bailment be gratuitous or for hire, on the accomplishment of the purpose for which it was made, the bailment comes to a natural end; and so where a bailment was for a fixed time, and the period has elapsed, no demand is necessary to give the bailor an immediate right to possession. In the case of a bailment for an indefinite time terminable at will, a demand by the bailor will ordinarily be necessary to terminate the bailment and support an action of trover if the property is not returned or accounted for.[70]

82. **Termination by conversion.**—A bailor may maintain an action of trover against the bailee, if by

[68] Hartley v. Miller, 163 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81.

[69] Gibson v. Bessemer, etc., Co., 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689. See also N. Y., etc., Ry. Co. v. N. J., etc., Ry. Co., 60 N. J. L. 338, 38 Atl. 828, LEADING ILLUSTRATIVE CASES.

[70] Shriner v. Meyer, 171 Ala. 112, 55 S. 156, Ann. Cas. 1913 A. 1103.

wrongful use or disposal of the goods the bailee has repudiated his obligations and thereby enabled the bailor to exercise the rights and remedies of a person entitled to possession. If a bailee misappropriates the property, as by selling or pledging it as his own, the bailor may immediately elect to treat the bailment as ended and bring trover for its value, or he may elect to treat the bailment as continuing and to sue for damages. A bailee, if he has any right of enjoyment or use, must use the thing in moderation, and not exceed the limits of the bailment. If his acts imply an assertion of title or right of dominion inconsistent with the bailor's ownership, this is a conversion of the property. Mere misuse, or unauthorized use of the thing bailed, without adverse claim, may only amount to a breach of obligation or a tort in the nature of waste falling short of conversion.

There is a difference of opinion between the American and English courts as to the effect of unauthorized sale or disposal of pledged property by a pledgee to terminate the bailment, and as to whether tender of the balance due is necessary as a condition of bringing an action of trover against the pledgee.

In Halliday v. Holgate,[71] a pledgee sold certain stock without the demand or notice required. The assignee in bankruptcy of the pledgor brought an action of trover to recover the value of the shares thus wrongfully disposed of, without having tendered any part of the debt secured. It was held,

[71] L. R. 3 Exch. 299 (Eng.).

confirming the decision in Donald v. Suckling,[72] that, assuming the sale to be wrongful, yet, as the immediate right to possession of the shares of stock was not by the sale revested in the plaintiff, he could not maintain trover, either for the whole value of the shares or for nominal damages, thereby substantially overruling the decision in Johnson v. Stear.[73]

The doctrine thus announced in England prevails in some of the states of this country. But by the general American rule, where the unauthorized sale or disposal of pledged stock or other property results in placing it beyond the power of the pledgee to restore it, the pledgor is not bound to pay or tender the amount of his debt before bringing suit against the pledgee for conversion. The effect of an unauthorized sale or disposal by a pledgee is to terminate the bailment and revest in the pledgor the immediate right to possession, thus dispensing with tender as a condition precedent to bringing trover for a conversion.[74]

[72] L. R. 1 Q. B. 585 (Eng.).

[73] 15 C. B. (N. S.) 330 (Eng.).

[74] Austin v. Vanderbilt, 48 Ore. 206, 85 Pac. 519, 6 L. R. A. (N. S.) 298; Mullen v. Quinlan & Co., 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511.

CHAPTER XII.

OBLIGATIONS OF BAILOR AND BAILEE ARISING FROM BAILMENT.

83. **Foundation of liability of bailee in tort or contract.**—Where the bailee is guilty of a culpable loss or injury of the goods in his care, the authorities generally hold that the bailor may bring an action either on the theory of tort or for breach of contract at his option.[75] Even in the case of gratuitous bailments, it is said that the modern theory of the bailee's liability is that of contract, and that the bailor's delivery of possession is the consideration for the bailee's promise to either keep or carry safely.[76] Since, however, the custody of the goods as a favor is a burden to the bailee and an advantage to the bailor, it would seem fictitious to speak of the delivery of possession as in reality a consideration. Some courts hold that the gratuitous bailee is liable only in tort and not in contract.[77] The true theory as to the source of the bailee's obligation to care for things intrusted to him would seem to be that of an obligation imposed by law, rather than either tort or contract. The acceptance of the goods by the bailee involves the assumption of an affirmative obligation to use diligence, which arises even without

[75] Nat'l Bank v. Graham, 100 U. S. 699.
[76] Pollock, Contracts (3d ed.), p. 194.
[77] Flint and P. M. Ry. Co. v. Weir, 37 Mich. 111, 26 Am. Rep. 499.

consideration where one takes charge of the goods of another as by finding, and enters into a relation where the owner must necessarily depend on the bailee to look out for his property. Oftentimes this obligation will partake of the nature of contract, as, in borrowing an article, the borrower impliedly agrees to return it; and the failure to perform this undertaking constitutes a breach of contract or obligation on account of which an action ex contractu may be maintained.[78] There is, however, no implied contract in the case of a gratuitous bailment by finding, but obligations will result from the bailee's undertaking to hold the property for the benefit of the bailor.[79]

84. **Duty of the bailor.**—It is the duty of a bailor lending a thing to another to disclose to the borrower any defects or vices known to him which may render the use of the thing dangerous or unprofitable to the borrower, as if a man loans to another a vicious horse. A mere lender is not liable for injury to a borrower arising from a latent defect unknown to him, but a letter of a bicycle or livery rig for hire is responsible for the exercise of at least ordinary care to ascertain defects in the thing hired, it being an implied obligation in the contract of hiring to supply a thing reasonably fit for the purpose intended.[80] We need not speak further of the duty of the bailor, as the duties and responsibilities of

[78] Tindall v. McCarthy, 44 S. C. 487, 22 S. E. 734; Chapman v. State, 104 Cal. 690, 38 Pac. 457.

[79] Beale, Gratuitous Undertakings, 5 Harvard Law Review 222; see also 27 Harvard Law Review 167, 168.

[80] Copeland v. Draper, 157 Mass. 558, 19 L. R. A. 283.

the bailee constitute, perhaps, the most important inquiry in the law of bailments, and to these we shall now direct our attention.

85. **Classification of bailments and measure of duty of the bailee.**—The modern classification of bailments is usually made with a view to facilitating the inquiry, what are the obligations, duties and responsibilities of the bailee toward the bailor in regard to property? This inquiry as to the measure of diligence owed by the bailee turns somewhat on the question whether the bailment is for the sole benefit of the bailor, or for the sole benefit of the bailee, or is put on a business basis for the mutual benefit of both parties. The law of bailments is given a somewhat foreign appearance by the coating of Latin names which are given to the various species of bailments, and which will be mentioned under the following classification. They were adopted by Lord Holt in the case of Coggs v. Bernard,[81] and have ever since continued in common use in our law.

There are, then, (1) bailments for the bailor's sole benefit, which include (a) the taking of a thing on deposit, such as a grip or package to be looked out for as a personal favor, known as *depositum;* (b) the taking charge of property to perform work upon it, or carry it from place to place without compensation, which is known as *mandatum;* in both of which species of bailments slight diligence is said to be exacted of the bailee, since one who takes charge of goods as a favor to another should ordi-

[81] 2 Lord Raymond 909 (Eng.); see § 67.

narily be held to the least degree of responsibility in regard to them.

Furthermore, there are (2) bailments for the bailee's sole benefit, of which the principal species is the gratuitous lending of a thing, like a bicycle, carriage or book, for the temporary accommodation of the borrower, known as *commodatum,* in which a high degree of care and diligence is said to be expected of the bailee.

Turning from gratuitous bailments as a favor to the bailee or bailor, to those which are put on a business basis, there are (3) bailments for mutual benefit or for hire, in which ordinary care and diligence is exacted from the bailee. This class includes various species: (a) the deposit of a thing in storage for a consideration, as in a warehouse, which is known as *locatio custodiae;* (b) the deposit of a thing to be repaired or worked upon, which is known as *locatio operis faciendi;* (c) the carriage of a thing for reward, which is known as *locatio operis mercium vehendarum;* (d) the letting and hiring out of a thing for a rental, as of a rig from a livery stable, which is known as *locatio rei;* (e) the pledge or deposit for security, as where a watch is pawned to a creditor to secure a debt, which is known as *pignus.*

There is a fourth class of bailments which may be termed (4) special or insurance bailments, where the bailee has a higher degree of responsibility than the law would ordinarily impose on the mere circumstance of a bailment per se, which responsibility results either (a) from special contract, or (b) is

imposed by law on considerations of public policy in connection with certain callings upon which the public is dependent, especially those of innkeepers and common carriers.

86. **Deposit.**—Deposit is a bailment by which a depositor places goods in the custody of a depositary to be kept or stored by him as a favor. The depositary must exercise at least slight care and skill such as a prudent man would use under the circumstances, to preserve the goods safely. If the bailee is to receive no compensation for his services and the bailment is solely for the benefit of the bailor, the jury are to be instructed that the law does not exact so high a degree of care as where the benefit is mutual, or entirely on the side of the bailee.[82]

In Preston v. Prather,[83] a bank received bonds as a special deposit for safe-keeping for the benefit of the owner without compensation. The bank employed a cashier who had free access to the vaults where the bonds and securities were deposited. He had been speculating heavily on the Board of Trade in Chicago, and this fact came to the notice of the bank directors. Nevertheless, they took no precautions and the cashier misappropriated the bonds and absconded. The case was carried to the Supreme Court of the United States, and the court held the bank liable. In the opinion it is said: "Undoubtedly, if the bonds were received by the defendants for safe-keeping without any compensation to them in any form, but exclusively for the benefit of the

[82] Hibernia Bldg. Assn. v. McGrath, 154 Pa. St. 296, 26 Atl. 377.
[83] 137 U. S. 604.

plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. * * * The exercise of reasonable care is in all such cases a dictate of good faith."[84]

Degrees of diligence or negligence. It has been said that the gratuitous depositary cannot be held for loss or injury unless he is "grossly" negligent, but this statement of the law fails of universal approval. These degrees of diligence and negligence, "slight," "ordinary," and "great," used of the different classes of bailments, some courts would wish to see discarded and would judge of each case by its own complexion. It may be laid down as a general rule in all classes of bailments, in case of loss or damage to the property, that it is a question of fact for the jury whether under the circumstances of the particular case reasonable care was exercised by the bailee.[85] What it is fair and reasonable to expect from the bailee depends in part upon the circumstance of compensation, and in part upon the situation and nature of the property, and the risks to which it is exposed. The rules as to degrees of diligence or negligence are rather rough guides for a jury than strict rules of law. The true measure of the responsibility of the bailee is that he is bound to do that which his position as possessor of the prop-

[84] A depositary such as a bank would be liable for embezzlement of a special deposit by a cashier acting in the scope of his employment even if due care were used in his appointment, on principles of agency; though perhaps not, if the thief were a menial servant.

[85] Preston v. Prather, 137 U. S. 604.

erty makes it reasonable and just to expect of him. Gross negligence is nothing more than the failure to bestow that care which the property in its situation reasonably demands.[86]

"An example is stated by Pothier, to test the fidelity of a depositary. His house is on fire and he removes his own goods, and those of the bailor are burned; is he then responsible? He certainly is, if he had time to remove both. If he had not, Pothier then admits that a breach of faith cannot be imputed to him for having saved his own effects in preference to those of another intrusted to his keeping. But if the goods intrusted to him were much more valuable than his own, and as easily removable, then he ought to rescue the deposited goods."[87]

87. **Mandate.**—It is usually said that the gratuitous depositary must use at least slight care for the preservation of the thing deposited, and the same is true of the mandatary who undertakes some services about the thing put in his charge. The converse of slight diligence is gross negligence, but it is preferable to measure degrees of diligence owed as slight, ordinary and great; and then any neglect or omission of due diligence is a violation of legal duty, whether great or little. The courts, however, frequently speak of degrees of negligence.

In Tracy v. Wood,[88] the plaintiff intrusted to defendant, a money broker, a large number of gold coins to be carried gratuitously from New York to

[86] Compare Gray v. Merriam, 148 Ill. 179, 32 L. R. A. 769, 39 Am. St. Rep. 172.

[87] 2 Kent, Commentaries, p. 565.

[88] 3 Mason 132, Fed. Cas. No. 14130.

Boston. Defendant put the coins, which were in two bags, into a valise with money of his own, brought the valise in the evening aboard a steamboat which was to start the next morning, and left it in a berth in the forward cabin. He then went to a theatre, and on his return slept in the middle cabin. In the morning one of the bags was gone. Defendant left the valise on a table in the cabin for a few moments while he went on deck to send information of the loss to the plaintiff, the loss then being known to a large number of passengers. When he came back, the second bag was gone.

Story, Circuit Justice, in summing up the evidence, said:

"I agree to the law as laid down at the bar, that in case of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Boston, and he is not responsible unless he has been guilty of gross negligence. * * *

"The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence; but whether there be a want of that

care, which men of good sense, however inattentive, usually take, or ought to be presumed to take of their own property, for that is gross negligence. * * *

"The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property.

"The defendant is a broker. * * * He kept his own money in the same valise; and took no better care of it than of the plaintiff's. Still, if the jury are of opinion, that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence."

A distinction exists between nonfeasance and misfeasance, that is, between the total omission to do an act which one gratuitously promises to do, and culpable negligence in the execution of it. In the famous case of Coggs v. Bernard,[89] the defendant undertook gratis (free of charge) to carry several hogsheads of brandy from one cellar and deposit them in another, and he did it so negligently that one of the casks was staved and the brandy lost. The King's Bench held that the defendant was liable for misfeasance in the work which he had undertaken to perform, on the ground of his neglect and carelessness, though he was to have nothing for his trouble. Lord Holt admitted that if the agreement

[89] 2 Lord Raymond 909 (Eng.).

had been executory, to carry brandy at a future time, the defendant would not have been bound to carry it; but in the case before him, the defendant had actually entered upon the execution of the undertaking, and having done so, he was bound to use a degree of diligence and attention adequate to its proper performance.

88. **The loan of goods.**—The loan of goods is a bailment, whereby the lender allows another, the borrower, temporary possession and use of goods without compensation. The accommodation borrower of a chattel, as of a horse, a carriage or a book, must exercise great care for the preservation in safety and good condition of the thing lent, and is answerable for damages resulting from the least neglect, or deviation from the terms of the loan, as for example, going with a horse to a different destination from the one designated.[90] The borrower can use the goods only for such purposes as the lender might reasonably be understood to have consented to, and only for the time for which they were lent. He must not part with them to a third person without the consent of the lender and must restore them in as good condition as they were when received, reasonable wear and tear excepted, unless lost or damaged without his fault. The lender may at any time require the return of the goods, even though lent for a specified time and purpose. The borrower is not liable for the loss of a thing from the wrongful act of a third person which he could not foresee or prevent, as when he borrows a horse for a journey

[90] Scranton v. Baxter, 4 Sandf. 5 (N. Y.).

and is robbed of it without any neglect on his part. The borrower is, however, responsible for loss by inevitable accident if it occur during an unauthorized use of the goods, or after the time when he ought to have returned them.

89. **Letting and hiring and other bailments for mutual benefit.**—Letting and hiring is a contract whereby the letter allows another, the hirer, to use the goods for a limited time for an agreed rental. The letting of land is a lease, and besides establishing a contractual relation between the parties, results in conferring on the lessee an interest or estate for a specified time in the land. We have already seen that the hirer of a chattel is, as a bailee in possession, entitled to protection as against persons unlawfully disturbing his possession. In lettings where the bailee is to receive a consideration in the beneficial use of property, he is held to ordinary care, such as a prudent man might reasonably be expected to take of his own property. He is bound to restore the thing at the end of the hiring in the condition in which it was received, fair wear and tear excepted. A bailee for hire is not, however, an insurer of the thing bailed, and is excused from liability if the thing has been damaged or lost without neglect or fault on his part.[91]

It will not be necessary to speak in further detail of the different bailees for hire, although certain illustrations of their liability may be given. In the case of a wagon and contents left for hire in the keeping of a livery-stable keeper, the keeper

[91] Jaminet v. Am. Storage, etc., Co., 109 Mo. App. 257.

is a bailee for hire, like a warehouseman, bound to use ordinary care to protect the property from injury, such as would be exercised by a person of ordinary prudence; and in case the stable burns, he will be liable for the value of the wagon and its contents if they could have been saved by the exercise of ordinary care and exertion.[92] So a bath-house keeper is liable, as to apparel or valuables deposited by patrons with him for safe-keeping, for any loss or theft which could have been prevented by the exercise of ordinary care.[93] "While the customer pays nothing directly for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade to which the bailment is a necessary incident."[94]

90. **Deviation from the bailment.**—While any bailee for hire need exercise only ordinary business-like care and the diligence of a prudent man, if the hirer of domestic animals, or other bailee, depart from the terms of the bailment as by driving a horse to a place other than that mentioned in the contract of hire, he virtually becomes an insurer and absolutely liable for injury or loss occurring during such deviation or unauthorized use, even if it is not equivalent to a conversion.[95]

91. **Effect of special contract.**—Special contract may increase or diminish the usual responsibility

[92] Weick v. Dougherty, 28 Ky. L. Rep. 930, 90 S. W. 966.

[93] Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828.

[94] Woodruff v. Painter, 150 Pa. St. 91, 16 L. R. A. 451; Sulpho-Saline Bath Co. v. Allen, 66 Neb. 295, 1 A. & E. Ann. Cas. 21.

[95] Palmer v. Mayo, 80 Conn. 353, 68 Atl. 369, 15 L. R. A. (N. S.) 428; McCurdy v. Wallblom Furn. & Carpet Co., 94 Minn. 326, 3 A. & E. Ann. Cas. 468, 470, note.

of the bailee imposed by law on the circumstance of voluntarily undertaking the bailment relation. A bailee may enlarge his responsibility and may agree absolutely to return the thing or its value, so as to become practically an insurer against all risks; or he may stipulate that the goods shall be at the risk of the bailor. It is sometimes a difficult question of construction to ascertain how far the parties have changed their common law liabilities. In a case where the bailee specially contracted to return a stallion hired in as good condition as when received or pay its value, the bailee was held liable as an insurer for the death of the stallion from disease, independent of negligence or fault on his part.[96] By the weight of authority, however, an absolute promise to return the property, without any promise to pay its value in event of failure to return, does not indicate an intention to enlarge the ordinary liability of the bailee. Thus in Young v. Leary,[97] a charterer of a ship contracted to "deliver back the ship in the same condition she now is in, ordinary wear and tear excepted." The vessel was burned without fault of the charterer and he was sued on the contract, the question being whether his obligation to deliver her back was absolute. It was held not, and that he was absolved by the fact that the vessel was destroyed without his fault. The language of the contract had created no greater obligation than that which the law ordinarily raises without any such

[96] Grady v. Schweinler, 16 N. D. 452, 113 N. W. 1031, 14 L. R. A. (N. S.) 1089, 15 A. & E. Ann. Cas. 161.

[97] 135 N. Y. 569, 32 N. E. 607.

promise. But in a California case,[98] a warehouseman received wheat for storage which he agreed to deliver upon surrender of receipt, "damage by the elements excepted." The wheat was destroyed before delivery by fire of incendiary origin. The warehouseman was held liable as on an absolute contract to deliver the wheat unless prevented by the "elements" (equivalent to act of God), and as fire of incendiary origin was not such a cause, it was held to be no defense to show that the wheat was burned without negligence on his part. On the other hand, an exemption clause releasing a warehouseman from liability for loss by fire does not include exemption from fire through the warehouseman's own negligence, and a similar construction is put on a storage agreement where goods are to be stored at "owners' risk," in spite of the argument that a warehouseman is no insurer and is only responsible for negligence in any event.[99]

92. **Estoppel of bailee.**—A bailee comes under an obligation of a contractual nature by accepting goods from the bailor, to return the bailed property at the termination of the bailment. He may be excused for non-performance of this obligation by showing that the property has been taken from him by valid process of law, or by a person having paramount title, or that it has been destroyed by accident without his fault. He cannot, however, excuse failure to return the goods bailed by any defects in the

[98] Pope v. Farmers', etc., Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673.
[99] Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S. W. 249, 23 L. R. A. (N. S.) 1205.

bailor's title, even though the true title be in a third party, for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title.[1] The possession of a bailee is analogous to that of a tenant, who, having accepted the possession of land from another, is estopped to deny his landlord's title. The bailee must recognize the claim of the true owner with the right to possession at his peril. The bailee is, however, under duty to resist unlawful trespass or seizure of the property under void legal process, and must protect the property as he would his own. If taken from him, he should seek to reclaim it, and if he does not he may become liable for a conversion or negligent loss.[2]

93. **Burden of proof.**—The unexplained failure or refusal on the part of the bailee to return goods in proper condition is a prima facie case of negligence and puts the bailee under the necessity of rebutting this presumption of negligence if he would escape liability. While the authorities are in conflict, the modern rule places the duty on the bailee to explain the failure to make delivery of the thing bailed on proper demand, or its return in such a damaged condition as only culpable carelessness would probably have caused.[3] This is the more clearly so if suit is brought on theory of an affirmative contract to return and defendant seeks to ex-

[1] Jensen v. Eagle Ore Co., 47 Col. 306, 107 Pac. 259, 33 L. R. A. (N. S.) 681, note.

[2] Roberts v. Stuyvesant Safe Dep. Co., 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438.

[3] Nutt v. Davison, 131 Pac. 390 (Col.).

cuse the non-performance of the obligation. If the action is in tort and the bailor alleges negligence as the basis of his right to recover, he must prove the facts on which he relies for recovery; yet much the same result is reached as in contract by saying that the loss of the goods is prima facie evidence of negligence.[4] This holds true where the circumstances of the non-delivery or the return in injured condition lead to an inference of negligence. If, however, it appears that the goods were lost by burglary, theft or fire, it is for plaintiff to establish that this was occasioned by some omission of due care on the part of the bailee. Defendant need not go further than to explain the loss as being due to an apparent accident such as fire in the first instance.[5] Thus the plaintiff's own showing that the loss resulted from such cause as fire may justify an inference that the thing was injured by misfortune or accident,[6] and no presumption of negligent loss will arise to furnish a prima facie case against the defendant.

[4] Sulpho-Saline Bath Co. v. Allen, 66 Neb. 295, 1 A. & E. Ann. Cas. 21, 23, note; Cumins v. Wood, 44 Ill. 416, 92 Am. Dec. 189.

[5] Claflin v. Meyer, 75 N. Y. 260.

[6] Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595. 14 L. R. A. 215.

CHAPTER XIII.

INSURANCE BAILMENTS—INNKEEPERS AND CARRIERS.

94. **Obligations of public callings.**—The common law has long regulated certain public callings by imposing obligations and duties upon those engaged in these pursuits, particularly upon common carriers and innkeepers, toward all those who desire to employ them. As Blackstone says: "If an innkeeper hangs out a sign and opens a house for travelers, there is an obligation imposed by law to entertain all persons who travel that way, and upon a breach of this universal obligation an action on the case will lie against him for damages, if he, without good reason, refuse to admit a traveler." So, a common carrier, such as a railroad, is bound to furnish reasonable facilities to all shippers who apply, and to serve them all without discrimination at reasonable rates. The business of public warehousing, particularly of grain, may be made a public calling and subject to regulation as such, although such warehousemen are not made, even by statute, to bear the liability of an insurer. These obligations incident to public callings, upon which the public depend for transportation, travel, and certain necessities of life, are imposed upon considerations of public policy and welfare.

95. **Common carriers.**—A common carrier is at common law virtually an insurer, absolutely liable

for loss of or damage to freight and packages committed to his care, except where it results from act of God, the public enemy, or fault of the shipper. An ordinary private carrier, employed specially to transport goods, on the other hand, is subject to the same degree of accountability as other bailees for hire, and would not be responsible for goods stolen or burned without his fault. It is a very important question, sometimes, to determine whether a railroad is holding freight or baggage awaiting delivery at its destination as a common carrier, or only as a warehouseman liable for ordinary negligence. According to some authorities, a railroad is a custodian and not an insurer from the moment of arrival; according to a second view, the railroad remains liable as a carrier until a reasonable time after arrival has elapsed for the consignee to call and take away the goods; according to a third view, which seems preferable, the carrier is liable as such until after reasonable notice of arrival and time to receive and take away the goods. The obligations of common carriers as bailees and otherwise are treated in another volume under the topic of Public Service Companies.

96. **Foundation of liability of innkeeper.**—The common law has, from an early date, imposed an extraordinary liability on innkeepers, making them virtually insurers of a guest's property left within the inn, except for losses due to act of God, or the public enemy, or the contributory negligence of the owner. The policy of the law has been to hold an innkeeper to the same extent as a common carrier,

and on similar grounds; his liability being a burden pertaining to the business wherein he is engaged, based on considerations of public policy, rather than an incident to a bailment or contract between the parties. This rule of strict liability comes down to us from the day when travel was done mostly on horseback and the highways were infested with robbers. The public inns were an essential part of the transportation system, and furnished necessary entertainment to the wayfarer and his beast overtaken by night. As Shakespeare describes it:

"The West yet glimmers with some streaks of day,
Now speeds the 'lated traveler apace
To gain the timely inn."

The traveler, thus compelled to repose confidence in a host, was protected by a stringent rule of liability on the part of the innkeeper, against depredation, theft, or fraud by collusion between his host and the numerous highway robbers.

97. **Modern measure of liability.**—The stringent common law rule still prevails in the majority of states, by which the innkeeper, like the common carrier, is an insurer of the goods, apparel, moneys, and beast or conveyance, of his guest which are placed within the protection of the inn (*infra hospitium*). This protection is incident to his undertaking to feed, lodge, and accommodate the guest for suitable reward. It is not necessary that the goods should have been delivered into the possession, or special keeping, of the innkeeper or his servants, in order to make him liable. If they be within the precincts of the inn it is sufficient to charge him. His re-

sponsibility extends, prima facie, to every part of the house or stables into which it is usual for property to be taken, and he is, therefore, liable for money stolen from a guest's trunk, which has been taken to his room.[7]

In Calye's case,[8] which contains much of the foundation of the law of the responsibilities of innkeepers toward their guests, it was held that if the guest direct that his horse be put to pasture and it be stolen, there is no liability; but if he do not so request and the innkeeper put the horse to pasture "of his own head," he shall answer if the horse be stolen.

An innkeeper may, by reasonable regulations, require the guest, if he means to hold the innkeeper to his responsibility, to deposit valuables in the hotel safe, leave the room locked, or comply with any other regulation that is just and reasonable. It is necessary, however, that the regulation be brought to the knowledge of the guest.

In case of loss, it is not necessary to prove negligence in the innkeeper, as he is bound to answer for all thefts, fires, losses, and damage happening even without his fault, unless they occur from act of God, or the public enemy, or by fault of the owner.

98. **Rule of prima facie liability.**—The harsh rule of the common law which makes an innkeeper responsible like a common carrier for all losses which occur, though without any fault of his, has been relaxed in a number of the states and also in England,

[7] Epps v. Hinds, 27 Miss. 657, 61 Am. Dec. 528.
[8] 8 Coke 32 (Eng.), 1 Smith Lead. Cas. (11th ed.), p. 119.

in view of the changes which have occurred in conditions of travel. A distinction is drawn between goods stolen and goods destroyed by fire for which the landlord is in no degree responsible.[9] According to the older view, the innkeeper is liable not only for theft, but for accidental fire, even if he used all possible diligence to preserve the property, unless the fire were caused by act of God, or superhuman agency such as lightning.[10] According to the so-called "rule of prima facie liability," while the innkeeper is held absolutely liable for loss of goods by robbery or theft from within the house, he is only prima facie liable for accidental fire, or the negligence of a third person, and may excuse himself by showing the loss to have been an unavoidable accident without fault or negligence on his part, though not caused by an act of God. The burden of proof is upon the innkeeper to show the circumstances of the loss and how the accident happened. Some courts even go to the extent of absolving the innkeeper from liability from loss by theft, if he can show that the theft happened without fault or negligence on the part of himself or his servants.[11]

99. **Relation of guest and innkeeper must exist.** —Under so extensive and exceptional a rule of liability, it becomes very important to determine who are innkeepers and guests, and when the relation between them exists. An inn may be defined as a

[9] Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571.

[10] Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405.

[11] 22 Cyc. 1081.

house regularly kept open in the public business of furnishing entertainment and accommodation to travelers for compensation. It is to be contrasted with a lodging or boarding house, which is of a private nature, not open for the convenience of travelers, but where the patrons make a more or less regular abode.

A lodging, boarding, or rooming house, therefore, is not an inn because it is not intended for the accommodation of travelers. A restaurant is not an inn because it furnishes only food. An innkeeper, as to his permanent resident lodgers, is to be regarded rather as standing in the relation of boarding-house keeper than of innkeeper, under the special obligations owed to travelers. Hotel keepers thus frequently occupy a double capacity, being both innkeepers and boarding-house keepers. As innkeepers they entertain travelers and strangers as guests; as boarding-house keepers they receive residents and regular boarders. As to the goods of boarders the proprietor is responsible only for the want of reasonable care in their protection, like other bailees for hire.[12] It has been held that a nonresident who goes to a hotel which is run as a summer resort, for a short stay, paying board by the week, is a guest rather than a boarder and may hold the proprietor to the liability of an innkeeper.[13] By most authorities the furnishing of food as well as lodging is an essential characteristic of an inn;

[12] Coe v. Ricker, 101 N. E. 76 (Mass.); Taylor v. Downey, 104 Mich. 532, 29 L. R. A. 92.

[13] See Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037, 14 L. R. A. (N. S.) 475.

but some courts deny that furnishing meals is essential.[14]

The relation of innkeeper and guest is established when the traveler visits the inn or hotel to obtain food or lodging, though he goes merely for food during the day. The innkeeper may become responsible for the goods of the guest, even before the relation of host and guest is established, as where the intending guest gives his baggage to the porter of the hotel to be taken to the hotel. So, a traveler who is met at the door of an inn by a servant of the establishment to whom he delivers his grip and baggage is a guest from that time even though he does not register. If he goes to the dining room where he is served with food for which he pays, the innkeeper is responsible for his baggage.[15] On the other hand, one who goes to a hotel merely to pass the time and write letters without purchasing any accommodations, intending to spend "nothing but the evening with the hotel," does not become a guest, and the placing of his grips in the hotel is a gratuitous bailment by which the hotel is bound to use only slight care in the protection of his property, and is responsible only for gross neglect.[16]

100. **Illustrations.**—Suppose that a traveler comes to the hotel from a station to get a meal, and on entering the dining room hangs his valuable overcoat behind him on a peg. He finds when he has

[14] Nelson v. Johnson, 104 Minn. 440, 116 N. W. 828, 17 L. R. A. (N. S.) 1259, note.

[15] Memphis Hotel Co. v. Hill, 136 S. W. 997 (Tenn.), 34 L. R. A. (N. S.) 420. See also Tulane Hotel Co. v. Holohan, 105 Am. St. Rep. 930.

[16] Baker v. Bailey, 145 S. W. 532 (Ark.), 39 L. R. A. (N. S.) 1085.

finished his meal and is about to leave that his coat is missing or damaged. Here there is sufficient evidence to establish the relation of innkeeper and guest, so as to make the hotel proprietor liable for the loss without proof of negligence on the defendant's part.[17] On the other hand, if one, whether a traveler or not, enters a restaurant, not a part of a hotel, and hands his hat and coat to a waiter or an attendant who hangs them up or disposes of them in a cloakroom, and they disappear, this is evidence that the restaurant keeper is a bailee, and he is liable for injury or loss only through negligence or lack of due diligence while the coat was under his care.[18] Thus, if the place visited be not an inn, or the relationship of innkeeper and guest did not arise, the customer must show an actual bailment. If he hangs up the coat himself, instead of delivering it to a servant, this might be difficult to show, as bailment involves a delivery and an acceptance, and a person cannot be made liable as a bailee without his consent.[19] So, it would be doubtful whether a customer in a barber shop could recover from the proprietor for the loss of a hat or overcoat, taken from a peg near the door by some person on leaving the shop, especially if a check room were provided for the safe-keeping of apparel of patrons, and there were no invitation, express or implied, on the part of the proprietor, to leave things elsewhere.

101. **For what goods liable.**—There are two different views in regard to what property is covered

[17] Orchard v. Bush & Co., 2 Q. B. 284 (Eng.).

[18] Ultzen v. Nicols, (1894) 1 Q. B. 92 (Eng.).

[19] La Salle Restaurant & Oyster House v. McMasters, 85 Ill. App. 677.

by the innkeeper's liability. According to one view, he is liable for all the goods brought by a guest and received within the inn; according to the other, his responsibility is limited to "baggage," goods which are reasonable and necessary accessories of travel. Where property is brought to a hotel for sale or show, as in the case of samples of commercial travelers, the law does not hold the innkeeper to his strict liability, but only to the exercise of ordinary care.[20]

102. **Contributory negligence.** — Contributory negligence on the part of a guest will excuse the prima facie liability of an innkeeper for the loss of property. The question often arises how far it is negligence for a guest to fail to bolt or lock his door. According to some decisions, a failure to do so is not necessarily negligence, but is a fact to be considered by a jury as one of the circumstances of the case.[21]

103. **Termination of innkeeper's liability.**—The innkeeper's liability as such continues even though the guest is temporarily absent. As to effects left on the premises after a guest's departure from the hotel, the innkeeper's liability continues for a reasonable time in which to remove the goods. It does not cease the very instant the guest pays his bill, but after a time the innkeeper is only liable for goods left in his charge as a gratuitous bailee.[22]

[20] Williams v. Norvell, etc., Co., 116 Pac. 786 (Okla.), 35 L. R. A. (N. S.) 350; Fisher v. Kelsey, 121 U. S. 383.

[21] Spring v. Hagar, 145 Mass. 186, 13 N. E. 479.

[22] Oxford Hotel Co. v. Lind, 47 Col. 57, 107 Pac. 222, 28 L. R. A. (N. S.) 495.

104. **Liability of boarding-house keeper for care of goods of boarders.**—In a recent Massachusetts case,[23] plaintiff brought an action to recover the value of certain jewelry placed in the safe of the defendant, a summer-hotel keeper with whom the plaintiff boarded. It was held, in accordance with certain English authorities, to be the duty of the boarding-house keeper to take reasonable care for the safety of property brought to the house by a boarder. The landlord of a boarding house is neither an insurer nor a gratuitous bailee, but is a bailee for a consideration which is included in the board, and under an obligation to use reasonable diligence for the protection of goods of boarders, particularly as to articles directly left under his charge.

105. **Co-tenancy and other modifications of ownership.**—We have now concluded our survey of the nature and incidents of bailments, which involve the separation of possession from ownership. Other "estates," interests, or subdivisions of complete ownership in chattels may be referred to but briefly here.

Personal property may belong to two or more persons concurrently in joint tenancy or tenancy in common as well as real property. The different forms and incidents of co-ownership will be treated more fully in connection with the law of land. The right of survivorship is the great characteristic of property vested in joint owners as distinguished from tenants in common. Although joint tenants

[23] Coe v. Ricker, 101 N. E. 76 (Mass.).

are equally owners, when one joint tenant drops out of the group by death, the survivors take his share, so that the longest-lived tenant takes the whole in severalty. The interest of a joint tenant, therefore, cannot be transferred by will, nor does it pass at his death to his executors or administrators, but accrues to his co-owners.

The law, however, recognizes the right of a joint owner to transfer his undivided share inter vivos to another, and by such transfer the unity of title and the right of survivorship in the other tenants are defeated, and the new holder becomes a tenant in common with the other part-owners, so that if he dies, his interest will go to his executor or administrator for the benefit of his creditors, legatees, or next of kin. So, also, if personal property be used in a joint undertaking by way of partnership in trade, there can plainly be no right of survivorship to the exclusion of the estate of a deceased partner.

Tenancy in common is co-ownership of undivided shares in some article or mass of property. The shares may be equal or unequal and may be transferred by their holders. Apart from survivorship the incidents of joint and common ownership are quite similar. Each co-tenant has a right of possession of the common property, and consequently is guilty of no wrong in getting and holding possession even though he thereby excludes his co-owner from all beneficial enjoyment. Where the article is indivisible like a horse or cow, the doctrine gives the actual possessor an unjust monopoly of posses-

sion which can be remedied only by a partition by sale and a division of the proceeds. A right to a partition exists at common law when the property is naturally divisible, as in case of such commodities as grain, logs, or a number of cattle, separable by number, weight or measure.[24] Refusal to permit such a division is a conversion. One tenant in common may rightfully take away his share of a divisible mass without the intervention of a court to make division.[25] A tenant in common may bring trover against a co-tenant for conversion in case of destruction, misuse, or sale of the whole chattel, or any exercise of absolute dominion inconsistent with his rights as co-tenant, as by wrenching machinery from a mill and carrying it away.[26]

Other modifications of absolute ownership include the creation of future interests, as when one, by deed or will, limits his books or furniture to A for life, with remainder over to B. The law on this subject is in some uncertainty, although there seems no reason why such interests should not be created in personal property after the manner of reversions, remainders, and executory interests in real property, unless the use of the property by the particular tenant involves its entire consumption. The division of ownership between creditor and debtor for purposes of security will be considered elsewhere under the topics of Liens, Pledges, and Chattel Mortgages.

[24] Schouler, Personal Property (3rd ed.), § 165.
[25] Pickering v. Moore, 67 N. H. 533, 32 Atl. 828.
[26] Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261, note.

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QUIZ QUESTIONS

PERSONAL PROPERTY AND BAILMENTS

(The numbers refer to the numbered sections in the text.)

1. What are the two branches of property law?
2. (a) What is the distinction between real and personal property? (b) What are *fructus naturales* and *fructus industriales?* (c) Are the following classed as real or personal property: (1) A lease of a lot and a building for ninety-nine years; (2) A certificate of stock in a company owning land; (3) An annuity to A and his heirs; (4) The trees, fences and buildings on a farm; (5) Growing crops and fruit; (6) A promissory note; (7) Fish in a pond; (8) Ice?
3. What is the reason of the divergence in the law of real and personal property?
4. What is the difference between choses in action and choses in possession? Give examples.
5. Classify the different modes of acquiring title to personal property.
6. The crew of the ship "Rainbow" raised and made fast to a whale in the North Sea, but he escaped, dragging the iron and line, and so far outran his pursuers that the boat's crew of the "Hercules" did not know that any one had attacked or was pursuing the whale when they met and captured him. The master of the "Rainbow" was in fact pursuing; he came up before the whale had rolled over, and said that one of his irons would be found in it, which proved to be true, and he thereupon took the prize. Assuming that there was a reasonable probability that the whale would have been captured by the "Rainbow," if

the boats of the Hercules had not come up, which ship is entitled to the whale?

7. Pierson had captured a live fox, but it escaped from the enclosure. He pursued it with his dogs and would soon have succeeded in taking the animal, but Post intercepted it in sight of Pierson and carried it off. Who is entitled to the fox?
8. Who has title, (a) if A starts game on the land of B, and takes and kills it there; (b) if A starts game on the land of B and takes and kills it on the land of C; (c) if A starts game on his own land and kills it on the land of B; (d) if A starts game on the land of B and kills it on his own land?
9. Suppose A has surrounded fish in a net in B's pond, and C takes the fish therefrom; can A sue C?
10. Would it affect the above case if the fish were caught in violation of game laws, or without a fishing license?
11. What is the distinction between lost and abandoned chattels?
12. A sheep belonging to a person unknown was found on the highway by A, who carried it to his house, and tied it with a cord. The sheep broke the cord and went back to the highway, where it was found next day by B, who took it and put it in his fold. A, seeing it there, demanded it. B asked him if it belonged to him. A replied that he did not know the owner, but that he himself had found it the day before. B refusing to give the sheep up, A took it out of the fold and carried it home. Can B sue A?
13. (a) A, the conductor of an electric car owned by the X company, while performing his duties as a conductor, found a pocketbook containing $100, which a passenger had left on one of the seats. The X company demanded it of A, who refused to give it up. May the X company recover the pocketbook or its value from A? (b) To whom would an irregularly-shaped mass of iron, formerly belonging to the Indians and worshipped by them as a medicine rock, belong, if found by you many years afterward on the land of another person where the Indians had abandoned it? (c) Two boys unearthed on defendant's premises an old can containing gold coin to the value of $7,000.

Upon learning of the find, the defendant compelled the boys to deliver the money to him on the ground that he had the better right to it as owner of the premises where it was found. Can the boys recover possession in a proper action?

14. (a) What is the distinction between property lost and mislaid? (b) One Hoagland visited the Forest Park Highlands, a place of amusement in the city of St. Louis. He sat down at one of the tables which were scattered about the grounds, when he found a pocketbook lying on the ground. The manager demanded the pocketbook as property inadvertently mislaid by the loser, and on Hoagland's refusal to deliver it up, ejected him from the premises. Who was entitled to possession of the pocketbook? (94 Am. St. Rep. 741.)

15. (a) Trover is brought for a $50 bill.—Defendant, a dealer in junk, bought an old iron safe, paying for it by the pound. He turned it over to plaintiff, an employe, with instructions to take out the compartments and other removable parts. Plaintiff discovered in a crack in the lining of the safe a $50 bill. He gave it to the defendant and asked him if it were genuine. Defendant said he would take it to a bank and see. It was found to be genuine and the defendant refused to give it back on demand. Plaintiff sues him in trover. Can he recover the money? (b) Some coins are found in a crack in the floor of a building by a tenant; can the owner recover possession on the ground of ownership of the premises?

17. What is the justice or policy of recognizing title by adverse possession?

18. (a) What are the requisites of adverse possession? (b) Can a thief who holds possession secretly for the statutory period acquire title in this way?

19. B, in 1880, converted a mare, the property of A. In 1883, the mare had a foal, which, in 1884, B sold to C, and which, in 1887, A found on the highway, and refused on C's demand to give up to him. C, in 1888, brought trover against A. Can it be maintained? It is to be assumed that by the Statute of Limitations six years is a bar to an action of trover or replevin.

20. (a) Does the Statute of Limitations transfer or merely quiet title? (b) A, to whom I have loaned my horse in New York, takes the animal to Oklahoma and keeps him there in open and notorious possession for four years; he then sells him to B, who has no knowledge of my claim, and who keeps him for a year more in Kansas, when he brings him to New York and I take possession of him. Assuming the period of limitation on actions to recover possession of personal property, or its value, to be five years in Oklahoma and Kansas, and six years in New York, was I justified in retaking the horse?

21-22. (a) Y delivered a trunk to one Sawin to carry from Boston to Cambridge. Sawin loses it. Y sues Sawin in assumpsit and recovers $120 damages, which Sawin pays. Y afterwards, not through Sawin, but through the police, recovers the trunk, which has remained unbroken. Sawin, learning of this, demands the trunk. Y refuses to give it up to him, but tenders back the $120, which Sawin refuses to accept. Can Sawin replevy the trunk? (b) A's dogcart was converted by B, who sold it to C. A brought trover against B, recovered judgment for the full value, and directed the sheriff to levy the execution upon the dogcart, and sell it. The sheriff levied upon the dogcart, advertising it for sale, but before the sale C took it from him on a writ of replevin. In the replevin suit of C against the sheriff, for whom should there be judgment? (c) B stole A's horse and sold it to C, a bona fide purchaser. D stole it from C. C brought trover against D, recovered judgment, and D satisfied the judgment. Can A now maintain trover against D?

23-24. What is the extent of protection to an author's productions at common law?

25. Is the presentation of a play, or the public reading of a poem, a publication which will terminate literary property at common law?

26. Hoyt had written confidential letters to McKenzie, which McKenzie on a misunderstanding between himself and his friend undertook to publish. Hoyt brings a bill for an injunction to restrain publication. McKenzie makes two defenses: (a) That the receiver of a letter has exclusive

property in it; (b) that these were letters of friendship and had no value as literary property. Were either of these defenses good?

27. What is the policy of copyright statutes?

28-30. Are trademarks, inventions, good will and trade secrets recognized as property at common law?

31-32. Give instances of the application of the maxim that "an accession falls to the principal."

33-34. (a) What is the basis of title by accession? (b) What is the supposed dilemma in which the courts find themselves?

35-36. What is the so-called "change of species" test in accession?

37-38. A by mistake entered upon B's land and there cut down trees, and made them into railroad ties worth ten times the original value of the standing timber. A then sold the ties to C, a bona fide purchaser for value. Can B recover from C the ties or their value?

39. A owned a large tract of land covered by swamp and wild grass. He was making no present use of the land, holding it for investment only. B owned adjoining land, and by mistake cut a quantity of grass on A's land. The grass was worth, after severance, six times as much as when growing. B was about to cure it and bale it as hay when A seized it and claimed it as his own. B sues A for compensation for the value which he has added to the hay. Can he recover?

40. (a) A brings an action of replevin against B to recover possession of 100,000 bricks of the value of $7 per thousand, manufactured from clay belonging to the plaintiff A, on the ground that defendant B willfully appropriated said clay. X, claiming to be the owner of certain real estate, had leased it to B for the manufacture of brick. B commenced to manufacture brick thereon, but afterwards was notified by A that he claimed the land as his and that B must stop work, which B did not do. It appeared that X had an action then pending for the specific performance of an alleged contract for the land, and the bricks in dispute were all made while that action was

pending. The nature of X's claim does not appear, but judgment was finally rendered against him. In a replevin suit, judgment for whom? (b) A chance passerby finds a bear trap set on public land, but springs it, moves the trap a little way and resets it. The next night a bear is caught in the trap. To whom does it belong?

41. A cuts trees on what he knows to be B's land, and works the lumber up into boxes. The material can be traced into the boxes, but it is increased thirty-fold in value. The boxes were sold to X, who knows nothing of their history. Against whom can B bring trover and what will the damages in trover be?

42-44. Give an example of confusion of goods which is accidental or by consent. What is the result on the title?

45. A and B own adjoining wood lots. The timber standing on A's lot was worth $1,000; that on B's lot was worth $2,000. B cut all the timber on both lots. In cutting half of A's timber, B was conscious that he was trespassing; in cutting the other half, he was not so conscious. The timber was doubled in value by being cut. It was of similar quality, and was mixed together so that it was not possible to say which was from A's land and which was from B's land. B converted the timber into shingles which were worth $12,000. B sold $2,000 worth of the shingles to C, who believed B had a right to sell them and paid B for them. A brings trover against C. What judgment?

46-47. If one wrongfully empties another's bottle of fine wine into a hogshead or vat of his own wine of inferior quality, shall the bottle owner take the whole without allowance to the confuser?

48. (a) What are the remedies of A at the different stages of the case mentioned in No. 45? Suppose A delayed claiming his share of the timber when he knew that B was about to convert it into shingles. (b) A through mistake has cut wood on B's land and mingled it with wood cut on his own land. B has taken possession of the whole. What advice would you give A as to the remedies open to him? (c) If a natural gas company fraudulently commingles its gas with gas from the well of another under its con-

trol, keeping no account thereof, can it claim any part of the mixture or the proceeds thereof?

49. Compare the rules as to confusion and accession.

50-52. What is the rule as to tracing mingled funds as against a trustee?

53. What is the rule as to tracing mingled funds into an insolvent estate as against general creditors?

54. What is the rule as between innocent contributors as to tracing moneys mingled in a common fund from which there have been withdrawals made?

55-56. Define a gift and mention the essential elements of a gift.

57. May a gift be made by written instrument without delivery?

58. X and Y were friends rooming in the same house. X had a note of a third party for $100.00 payable to him or order. One night X, without consulting Y, placed it in an envelope addressed to Y and shot himself. Y, hearing the shot, came in and saw X lying on the floor, unconscious but still breathing. X died within five minutes, but before the death occurred, Y had seen the envelope addressed to him and had placed it in his pocket. Is this a valid gift?

59. (a) A was the owner of two promissory notes of $50.00 each made by a third party payable to bearer. He gave them to B, his nephew, to be placed in a safe in B's store for safe-keeping. Later B asked A for a loan of $100.00. A replied: "I won't loan you anything, but you may have the two notes you have been keeping for me." Is this a sufficient delivery? (b) One Devol, about to die, intrusted the keys to his box and private drawer of the safe of the bank of which he had been president to Mr. Lane. In the box and private drawer were stocks, bonds, money and other valuables. He instructed Mr. Lane to make up separate packages for various donees to be delivered to them in the event of the donor's death. Lane retained the keys and Devol never again took possession of the keys, although the money was permitted to remain in the donor's box until his death. The donees never knew of the intended gift. Was there a sufficient delivery?

60. How may a gift be made without delivery?

61. A, in expectation of death, delivered to her niece the key of a trunk containing a savings bank book, intending thereby to give the deposit to the niece. The trunk also contained other property, including several pass books. The niece obtained possession of the savings bank book, though this was never known to the donor. Was there a sufficient delivery, whether actual or constructive? (15 Harv. Law Rev. 751.)

62. (a) Is there any difference between the gift of one's own check or promissory note and the gift of a certificate of deposit in a bank? (b) A mother, having received life insurance money on the death of her husband, deposited the money in the defendant bank for her minor children, and took certificates of deposit, which were given to T, their so-called "guardian," payable to them or guardian. Was this a valid gift of the deposit? (c) Would the result have been different if the mother had taken certificates payable to the children or herself, and had herself held the certificates? Would that have amounted to a delivery or a complete gift of the bank deposit?

63-64. (a) How does a gift causa mortis differ from a gift inter vivos? (b) Mrs. Knight, an invalid woman, about to undergo a surgical operation, made an absolute, voluntary assignment of all of her property to a stranger. Is this a valid gift, either inter vivos or causa mortis? Which is it, presumably? (c) A made an entry in his savings bank book, "In case of my death, payable to B," delivered the book to B, and subsequently died. Can B collect the deposit?

65. Is a gift to an attorney by a client presumptively induced by fraud or undue influence?

66-68. What is the scope of the law of bailments?

69. How does bailment arise?

70. B went to A's store to buy a suit. The clerk told B to look over coats which were piled on a table, while he finished waiting on another customer. B took off his coat and vest, placed them on the table and tried on a number of coats. The floorwalker and other clerks were near, but the detective usually on the floor was out. Finally, the clerk came over and B said he had selected

his suit. When he picked up his own coat and vest, his watch and pocketbook were missing. B sues the proprietor of the store for the loss. May he recover?

71-72. Is the holding of goods by a thief, converter, clerk or servant the possession of a bailee?

73. A was accustomed to take the milk of patrons and manufacture it into butter and cheese, market the product, deposit the proceeds and take for himself two cents for every pound sold, dividing the balance among his patrons in proportion to the amount of milk furnished by each. Being indebted to B, he assigned to him, as security for his personal debt, all the butter in his factory. What are the rights of X, Y and Z, who had furnished the milk from which the butter was made, as against either A or B?

74. On January 2, A deposited in a grain elevator owned by B, 1,000 bushels of wheat, and took a receipt in this form: "Received in store for and on account of A, 1,000 bushels of wheat, loss by fire at owner's risk. Wheat may be stored with other wheat of the same quality." The wheat was placed in a bin with wheat belonging to other persons and to B. The wheat was gradually drawn out of this bin by B without the bin being filled up, until January 27, when the bin was empty. B began on January 29, to fill up the bin again, and on February 8, it was as full as when A's wheat was first deposited. On February 11, the elevator was burned without B's fault. A brings trover to recover for the value of the wheat. On these facts, can he recover?

75. X deposits grain in Y's elevator and receives a receipt which calls on Y to deliver on presentation either grain of the same kind and quality, or the market price of the grain. In case of fire, does the loss fall on X or Y? Suppose the receipt gives X the option to call either for grain or the market price thereof.

76. Describe a consignment as contrasted with a sale.

77-78. I lease my house furnished to A for a year. Before the term has expired, the piano is injured by A's children; some chairs are broken up by him in beating his wife; the rest of the furniture is seized by the sheriff upon an execution against A. I bring trespass against A

for the piano and chairs. I bring trover against the sheriff for his wrongful seizure of my goods. Can these actions be maintained? If not, what remedies have I at common law?

79. I hire an automobile at the garage for an hour. B, in another auto, negligently runs into me and damages my hired machine to the extent of $300.00. I am not responsible to the garage. Can I sue B for the $300.00?

80. X ships goods by a railroad to himself at Z. At the destination, while the railroad is holding the goods under a lien for charges, the goods are seized by the sheriff on execution as the property of Y, and the railroad surrenders possession. Can X sue the sheriff in trover or only in case?

81. When is a demand necessary in order to sue a bailee in trover?

82. A pledged his watch to B with authority to sell it upon notice if it was not redeemed on January 1, 1894. On December 23, 1893, the debt not having been paid, B, having a good opportunity to sell the watch, did so for a fair price, but not for enough to pay the debt. A brought trover for conversion of the watch. Could he recover (1) the value of the watch? (2) nominal damages? (3) nothing? State as briefly as possible the reason for each recovery, and which you prefer.

83. Are the duties of the bailee to the bailor founded in tort or in contract or otherwise?

84. What is the duty of a livery-stable keeper to one who hires a rig for a trip over a rough, dangerous road?

85. (a) State the main classes of bailments and the sub-classes thereof. (b) What is a deposit, a mandate, a commodatum? (c) Mention five different species of bailment for hire.

86. (a) What is the measure of diligence exacted from a depositary? (b) Suppose a finder should leave a pocketbook filled with bills which he had found, in his overcoat hung up in a public place and it was stolen, would he be responsible therefor to the loser?

87. What was the holding in the case of Coggs v. Bernard?

88. What degree of diligence is exacted from a borrower of goods?

89. A leaves a suit with B, a dealer, to be cleaned and pressed. Two days later, A is advised by B that, after cleaning and pressing the suit, his shop and its contents were destroyed by fire. A bill for two dollars for services was enclosed by B. Is B liable to A for the loss of the suit?

90. A hired a horse from B on condition that it should be returned on one day's notice in the same condition as when received. The horse, while being used for a different purpose than that for which it was hired, fell and broke its leg, without fault on the part of the hirer. Is the hirer liable? Why?

91. What is the effect of a special promise to return property in the same condition as when received?

92. When may bailee deny the bailor's title?

93. A let a team of horses in a sound condition to B. They are returned lame. The hirer gives no explanation as to how the injury occurred. Is there a presumption that they were improperly used? Is the burden of proof to disprove negligence upon the bailee, or upon the bailor to prove negligence?

94-95. What is the foundation of the liability of a common carrier?

96. What is the foundation of an innkeeper's liability?

97-98. (a) What are two different views as to the proper measure of the innkeeper's liability at the present day? (b) I stop at a hotel; a fire occurs in the night and although I manage to escape, my clothes and valuables are destroyed in my room. Is the hotel keeper liable?

99. Who is an innkeeper and when does the relation of innkeeper and guest arise?

100. What are the liabilities of innkeepers and restaurant keepers for apparel stolen from a dining room?

101. For what goods is the innkeeper liable?

102. (a) Action by a boarder against a boarding-house keeper for the loss of wearing apparel, jewels, and ornaments.—It appears that the plaintiff locked the door of his room upon leaving it and placed the key under the carpet in the hall, as he had been requested to do by the chamber-

maid. There was but one key to each room, and the chambermaid, not having pass keys, was obliged to use plaintiff's key. The custom was for the boarders upon leaving their rooms and locking their doors, to put their keys under the carpet of the hall so that the chambermaid could find them and get into the rooms for the purpose of putting them in order. While plaintiff was absent from the room, someone entered it and stole his personal effects. Should plaintiff succeed? (b) What would be the effect of a notice posted in the office of the hotel or boarding house requiring boarders to deposit their jewels and ornaments in the office safe?

103. (a) When does an innkeeper's liability terminate? (b) A went to a hotel taking with her $5,000 in jewelry and clothing valued at $1,000. She placed the jewelry under her pillow. At noon the next day, A packed the clothes and jewelry in her trunk, paid her bill, and left orders to the clerk to deliver her trunk to a drayman who would call at 5 o'clock. At 3 o'clock the hotel burned. A sues to recover. What are her rights?

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